(15)

No. 95-1853-CFX Title: William Jefferson Clinton, Petitioner
v.
Paula Corbin Jones

Docketed: May 15, 1996 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	May 15 1996	Petition for writ of certiorari filed. (Response due June 14, 1996)
	May 17 1996	Brief of respondent Paula Corbin Jones in opposition filed.
	May 17 1996	LODGING consisting of ten bound copies of two lower court amicus briefs by the Solicitor General submitted by counsel for respondent.
	May 28 1996	Reply brief of petitioner William Jefferson Clinton filed.
	May 28 1996	Brief amicus curiae of United States filed.
	May 29 1996	DISTRIBUTED. June 14, 1996
	Jun 17 1996	REDISTRIBUTED. June 21, 1996
	Jun 24 1996	Petition GRANTED. SET FOR ARGUMENT January 13, 1997. **********
	Aug 8 1996	Joint appendix filed.
	Aug 8 1996	Brief of petitioner William Jefferson Clinton filed.
	Aug 8 1996	Brief amicus curiae of Law Professors (in support of Petitioner) filed.
	Aug 8 1996	Brief amicus curiae of United States filed.
	Aug 16 1996	Record filed.
	Aug 21 1996	Record filed.
	Sep 9 1996	Brief of respondent Paula Corbin Jones filed.
	Sep 9 1996	Brief amicus curiae of Law Professors (in support of Respondent) filed.
	Sep 9 1996	Brief amicus curiae of American Civil Liberties Union filed.
	Sep 9 1996	Brief amicus curiae of Coalition of American Veterans filed.
	Sep 24 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 9 1996	Reply brief of petitioner William Jefferson Clinton filed.
	Oct 15 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 29 1996	CIRCULATED.
	Jan 13 1997	ARGUED.

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No. _____

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until the President leaves office.

2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.

PARTIES TO THE PROCEEDING

Petitioner, President William Jefferson Clinton, was a defendant in the district court and appellant in the court of appeals. Respondent Paula Corbin Jones was the plaintiff in the district court and cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Jefferson Clinton respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 9, 1996.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 72 F.3d 1354. The court of appeals' order denying the petition for rehearing (Pet. App. 32) is reported at 81 F.3d 78. The principal opinion of the district court (Pet. App. 54) is reported at 869 F. Supp. 690. Other published opinions of the district court (Pet. App. at 40 and 74) appear at 858 F. Supp. 902 and 879 F. Supp. 86.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition for rehearing was filed on January 23, 1996, and denied on March 28, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983 (1994)

42 U.S.C. § 1985 (1994)

50 U.S.C. app. § 510 (1988)

50 U.S.C. app. § 521 (1988)

50 U.S.C. app. § 525 (Supp. V 1993)

FED. R. CIV. P. 40

These provisions are set forth at pages App. 79-85 of the Petitioner's Appendix.

STATEMENT OF THE CASE

Petitioner William Jefferson Clinton is President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed this civil damages action against the President in the United States District Court for the Eastern District of Arkansas. The complaint was premised in substantial part on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under the federal civil rights statutes and two arising under common law, and sought $175,000 in actual and punitive damages for each of the four counts.[1] Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343 (1994).

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office, asserting that such a course was required by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed trial until the President's service in office expired, but held that discovery

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[1] The first two counts allege that in 1991, when the President was Governor of Arkansas and respondent a state employee, he subjected respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (1994). A third claim alleges that the President thereby inflicted emotional distress upon respondent. Finally, the complaint alleges that in 1994, while he was President, petitioner defamed respondent through statements attributed to the White House Press Secretary and his lawyer, denying her much-publicized allegations against the President.

Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts. Respondent alleges that Trooper Ferguson approached her on the President's behalf, thereby conspiring with the President to deprive the respondent of her civil rights in violation of 42 U.S.C. § 1985. Respondent also alleges that Mr. Ferguson defamed her in statements about a woman identified only as "Paula," which were attributed to an anonymous trooper in an article about President Clinton's personal conduct published in *The American Spectator* magazine. Neither the publication nor the author was named as a defendant in the suit.

could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil litigation challenging his official acts as President. While the holding of *Fitzgerald* did not apply to this case because President Clinton was sued primarily for actions taken before he became President, the court stated that "[t]he language of the majority opinion" in *Fitzgerald*

> is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office.

Pet. App. 68-69. The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge stayed the trial "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.[2]

The trial court, observing that the plaintiff had filed suit three years after the alleged events, further concluded that the plaintiff would not be significantly inconvenienced by delay of trial. Pet. App. 70. However, it found "no reason why the discovery and deposition process could not proceed," and said that this would avoid the possible loss of evidence with the passage of time. Pet. App. 71.

[2] The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found that there was "too much interdependency of events and testimony to proceed piecemeal," and that "it would not be possible to try the Trooper adequately without testimony from the President." Pet. App. 71.

The President and respondent both appealed.[3] A divided panel of the court of appeals reversed the district court's order staying trial, and affirmed its decision allowing discovery to proceed. The panel issued three opinions.

Judge Bowman found the reasoning in *Fitzgerald* "inapposite where only personal, private conduct by a President is at issue," (Pet. App. 11), and determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. He also wrote that

> [t]he Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered.

Pet. App. 9.

Judge Bowman further concluded that it would be an abuse of discretion to stay all proceedings against an incumbent President, asserting that the President "is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion." Pet. App. 16. Ruling that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the stay of trial issued by the district court, (Pet. App. 5 n.4) (citing *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995), *cert. denied*, 1996 WL 26287 (Apr. 29, 1996)), Judge Bowman accordingly reversed that stay as an abuse of discretion. Pet. App. 13 n.9.

[3] Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 (1994) and the collateral order doctrine, as articulated in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) and *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones' cross-appeal. *See infra* pp. 16-19. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

In reaching these conclusions, Judge Bowman put aside concerns that the separation of powers could be jeopardized by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial. He stated that any separation of powers problems could be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13.

Judge Beam "concur[red] in the conclusions reached by Judge Bowman." Pet. App. 17. He stated that the issues presented "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. Pet. App. 17. He also acknowledged that "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" is a matter of "major concern." Pet. App. 21. He expressed his belief, however, that this litigation could be managed with a "minimum of impact on the President's schedule." Pet. App. 23. This could be accomplished, he suggested, by the President's choosing to forgo attending his own trial or becoming involved in discovery, or by limiting the number of pre-trial encounters between the President and respondent's counsel. Pet. App. 23-24. Judge Beam stated that he was concurring "[w]ith [the] understanding" that the trial judge would have substantial latitude to manage the litigation in a way that would accommodate the interests of the Presidency. Pet. App. 25.

Judge Ross dissented, stating that the "language, logic and intent" of *Fitzgerald*

> directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term.

Pet. App. 25. Judge Ross observed that "[n]o other branch of government is entrusted to a single person," and determined that

> [t]he burdens and demands of civil litigation can be expected . . . to divert [the President's] energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result . . . would impair the integrity of the role assigned to the President by Article II of the Constitution.

Pet. App. 26.

Judge Ross also stated that private civil suits against sitting Presidents

> create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes.

Pet. App. 28. At the same time, he reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

The court of appeals denied the President's request for a rehearing en banc, with three judges not participating and Judge McMillian dissenting. Judge McMillian said the majority's holding had "demean[ed] the Office of the President of the United States." Pet. App. 32. He wrote that the panel majority "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed filing for at least *three* years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary national importance, which was resolved erroneously by the court of appeals. For the first time in our history, a court has ordered a sitting President to submit, as a defendant, to a civil damages action directed at him personally. We believe that absent exceptional circumstances, an incumbent President should never be placed in this position. And surely a President should not be placed in this position for the first time in our history on the basis of a decision by a fragmented panel of a court of appeals, without this Court's review.

The decision of the court below is erroneous in several respects. It is inconsistent with the reasoning of *Nixon v. Fitzgerald* and with established separation of powers principles. The panel majority's suggested cure for the separation of powers problems -- "judicial case management sensitive to . . . the demands of the President's schedule" (Pet. App. 13) -- is worse than the disease: it gives a trial court a general power to set priorities for the President's time and energies. The panel majority also grossly overstated the supposedly extraordinary character of the relief that the President seeks. The deferral of litigation for a specified, limited period is far from unknown in our judicial system, and it is routinely afforded in order to protect interests that are not comparable in importance to the interests the President advances here.

Now is the appropriate time for the Court to address these issues. If review is declined, the President would have to undergo discovery and trial while in office, which would eviscerate the very interests he seeks to vindicate. Moreover, if the decision below is allowed to stand, federal and state courts could be confronted with more private civil damage complaints against incumbent Presidents. Such complaints increasingly would enmesh Presidents in the judicial process, and the courts in the political arena, to the detriment of both.

A. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Separation Of Powers.

1. The President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Unlike the power of the other two branches, the entire "executive Power" is vested in a single individual, "a President," who is indispensable to the execution of that authority. U.S. CONST. art. II, § 1. The President is never off duty, and any significant demand on his time necessarily imposes on his capacity to carry out his constitutional responsibilities.

Accordingly, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. 753. Indeed, "[t]his tradition can be traced far back into our constitutional history." *Id.* at 753 n.34. The form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit against him until he leaves office -- is modest. It is far more limited, for example, than the absolute immunity that *Fitzgerald* accorded all Presidents for actions taken within the scope of their presidential duties.

The panel majority concluded that because the *Fitzgerald* holding was limited to civil damages claims challenging official acts, the President should receive no form of protection from any other civil suits. This conclusion is flatly inconsistent with the reasoning of *Fitzgerald*. The Court in *Fitzgerald* determined that the President was entitled to absolute immunity not only because the threat of liability for official acts might inhibit him in the exercise of his authority (*id.* at 752 & n.32), but also because, in the Court's words, "the singular importance of the President's duties" means that "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751.

The panel majority ignored this second basis for the holding of *Fitzgerald*. The first basis of *Fitzgerald* -- that the threat of liability might chill official Presidential decision making -- is, of course, largely not present here, and accordingly, the President does not seek immunity from liability. [4] But the second danger to the Presidency emphasized by *Fitzgerald* -- the burdens inevitably attendant upon being a defendant in a lawsuit -- clearly exists here. The court of appeals simply disregarded this "unique risk[] to the effective functioning of government."

2. As the *Fitzgerald* Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. *See* 457 U.S. at 751 n.31. Justice Story stated that

> [t]he president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability.*

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added), *quoted in Fitzgerald*, 457 U.S. at 749. Senator Oliver Ellsworth and then-Vice President John Adams, both delegates to the Constitutional Convention, also agreed that

> the President, personally, was not . . . subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.

JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed., 1890), *quoted in Fitzgerald*, 457 U.S. at 751 n.31.

[4] The President reserved the right below to assert at the appropriate time, along with certain common law immunities, the defense of absolute immunity to the defamation claim that arose during his Presidency.

President Jefferson was even more emphatic:

> The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other . . . . But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905), *quoted in Fitzgerald*, 457 U.S. at 751 n.31. As the Court said in *Fitzgerald*, "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. 751 n.31.

3. The panel majority minimized the separation of powers concerns that so troubled the Framers. It ruled that these problems can never be addressed by postponing litigation against the President until the end of his term. Pet. App. 16. Instead, the panel majority's solution was "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. Rather than solving the separation of powers problems raised by allowing a suit to go forward against a sitting President, the panel's approach only exacerbates them.

The panel majority envisioned that, throughout the course of litigation against him, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. If the President disagreed with a decision of the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16. In other words, under the panel's approach, a trial court could insist, before con-

sidering a request by the President for adjustment in the litigation schedule, that the President provide a "specific, particularized" explanation of why he believed his official duties prevented him from devoting his attention to the litigation at that time. The court would then be in the position of repeatedly evaluating the President's official priorities -- precisely what Jefferson so feared.

This approach is an obvious affront to the complex and delicate relationship between the Judiciary and the Presidency. Neither branch should be in a position where it must approach the other for approval to carry out its day-to-day responsibilities. Even if a trial court discharged this mission with the greatest judiciousness, it is difficult to think of anything more inconsistent with the separation of powers than to put a court in the position of continually passing judgment on whether the President is spending time in a way the court finds acceptable.

4. The panel majority similarly attempted to downplay the demands that defending private civil litigation would impose on the President's time and energies. Pet. App. 13-15. The concurring opinion in particular likened the defense of a personal damages suit to the few instances when Presidents have testified as witnesses in judicial or legislative proceedings. Pet. App. 22-23. This notion is implausible on its face; there is no comparison between being a defendant in a civil damages action and merely being a witness. Even so, Presidents have been called as witnesses only in cases of exigent need, and only under carefully controlled circumstances designed to minimize intrusions on the President's ability to carry out his duties.

A sitting President has never been compelled to testify in civil proceedings. Presidents occasionally have been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (*Fitzgerald*, 457 U.S. at 754) and the defendant's Constitutional right to

compulsory process (U.S. CONST. amend. VI; *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)) -- factors that are, of course, not present here. But even in those compelling cases, as Chief Justice Marshall recognized, courts are not "required to proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). Instead, courts have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that limits the disruption of his official functions, such as by videotaped deposition.[5]

In any event, there is an enormous difference between being a third-party witness and being a defendant threatened with financially ruinous personal liability. This is true even for a person with only the normal business and personal responsibilities of everyday life -- which are, of course, incalculably less demanding than those of the President. A President as a practical matter could never wholly ignore a suit such as the present one, which seeks to impugn the President's character and to obtain $700,000 in putative damages from the President personally. "The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money, as many former public officials have learned to their sorrow." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring).

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[5] *See, e.g., United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House); *United States v. Poindexter*, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (videotaped deposition); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena because defendant failed to show that President's testimony would support his defense), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness and death."[6] In this regard the President is like any other litigant, except that a President's litigation, like a President's illness, becomes the nation's problem.

B. The Court Of Appeals Erred In Viewing The Relief Sought By The President As Extraordinary.

The court below appears to have viewed the President's claim in this case as exceptional, both in the relief that it sought and in the burden that it imposed on respondent.[7] In fact, far from seeking a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)" (Pet. App. 13), the relief that the President seeks -- the temporary deferral of litigation -- is far from unknown in our system, and the burdens it would impose on plaintiffs are not extraordinary.

There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), provides that civil claims by or against military personnel are to be tolled and stayed while they are on active duty.[8] Such relief is deemed necessary to enable members of the armed forces "to devote their entire energy to the defense

[6] 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105 (1926), *quoted in Fitzgerald*, 457 U.S. at 763 n.6 (Burger, C.J., concurring).

[7] For example, the panel majority declared that Article II "did not create a monarchy" and that the President is "cloaked with none of the attributes of sovereign immunity." Pet. App. 6.

[8] Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988).

needs of the Nation." 50 U.S.C. app. § 510 (1988). President Clinton here thus seeks relief similar to that to which he may be entitled as Commander In-Chief of the Armed Forces, and which is routinely available to service members under his command.

The so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. That stay affects all litigation that "was or could have been commenced" prior to the filing of that petition, 11 U.S.C. § 362 (1994), and ordinarily will remain in effect until the bankruptcy proceeding is completed. *Id.*[9] Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.

It is well established that courts, in appropriate circumstances, may put off civil litigation until the conclusion of a related criminal prosecution against the same defendant.[10] That process may, of course, take several years, and affords the civil plaintiff no relief. The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may

[9] Indeed, a bankruptcy judge's discretion has been held sufficient to authorize a stay of third-party litigation in other courts that conceivably could have an effect on the bankruptcy estate, even if the debtor is not a party to the litigation and the automatic stay is not triggered. *See* 11 U.S.C. § 105 (1994); 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994), and cases cited therein.

[10] *See, e.g., Koester v. American Republic Invs.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976).

not provide the relief they seek. This process too can take several years. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-07 (1973). And public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals can routinely delay litigation for a substantial period.

We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself "above the law," or that holding this litigation in abeyance would impermissibly violate a plaintiff's entitlement to access to the courts. More specifically, these examples demonstrate that what the President is seeking -- the temporary deferral of litigation -- is relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

C. The Panel Majority Erred In Asserting Jurisdiction Over, And Reversing, The District Court's Discretionary Decision To Stay The Trial Until After President Clinton Leaves Office.

1. Respondent cross-appealed to challenge the district court's order to stay trial. Ordinarily, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. *See* 28 U.S.C. § 651 (1994).[11] In asserting that jurisdiction existed for her cross-appeal, the respondent did not seek such a writ or contend that the stay was appealable under 28 U.S.C. § 1291 (1994) as a final order, or as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, respondent asserted, and the panel majority found, that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. 5 n.4.

In *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995), this Court ruled that the notion of "pendent appellate jurisdiction," if viable at all, is extremely narrow in scope (*see id.* at 1212), and is not to be used "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 1211. The panel majority sought to avoid *Swint* by declaring that respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4. This conclusion is incorrect.

The question of whether the President is entitled, as a matter of law, to defer this litigation is analytically distinct from the question of whether a district court may exercise its discretion to stay all or part of the litigation. The former question raises an issue of law, to be decided based on the President's constitutional role and the separation of powers principles we have discussed; the latter is a discretionary determination to be made on the basis of the particular facts of the case. Moreover, the legal question of whether a President is entitled to defer litigation is one on which the district court's determination is entitled to no special deference; a court's exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion.

---

[11] Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." *See, e.g., Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, it is not applicable here, where the district court's order clearly contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

The district court, in deciding to postpone trial in this case, explicitly invoked its discretionary powers over scheduling (Pet. App. 71 (citing FED. R. CIV. P. 40 and "the equity powers of the Court")), and based its decision not only on the defendant's status as President -- certainly a relevant and valid factor -- but also on a detailed discussion of the particular circumstances of this case:

> This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident . . . and desperately needs to recover . . . damages . . . . It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.
>
> The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court . . . . Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

Review of the district court's discretionary decision to postpone the trial -- unlike review of its decision to reject the President's position that the entire case should be deferred as a matter of law -- must address these particular facts of this case. Thus the respondent's cross-appeal raised issues that, far from being "inextricably intertwined" with the President's submission, can be resolved separately from it. The panel

majority's expansion of the court of appeals' jurisdiction over this interlocutory appeal was in error.

2. The decision to reverse the district court also was incorrect on the merits. As Justice Cardozo explained for this Court in *Landis v. North Am. Co.*, 299 U.S. 248 (1936), a trial judge's decision to stay proceedings should not be lightly overturned:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Id. at 254-55. Indeed, the Court in *Landis* specifically stated that

> [e]specially in cases of extraordinary public moment, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.

Id. at 256.

The panel majority justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. It is unclear what the panel meant by labeling the district court's order the "functional equivalent" of "temporary immunity", inasmuch as the district court held that the litigation could go forward through all steps short of trial. But it is entirely clear that the panel majority, in its sweeping and conclusory ruling, did not begin to conduct the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion.

D. The Court Should Grant Review Now To Protect The Interests Of The Presidency.

This is the only opportunity for the Court to review the President's claim and grant adequate relief. If review is declined at this point, the case will proceed in the trial court, and the interests the President seeks to preserve by having the litigation deferred -- interests "rooted in the constitutional tradition of the separation of powers" -- will be irretrievably lost. *Fitzgerald*, 457 U.S. at 743, 749. Should the President prevail on the merits below, this Court will not even have the opportunity to provide guidance for future cases.

Now, a court for the first time in history has held that a sitting President is required to defend a private civil damages action. This holding breaches historical understandings that are as appropriate today as ever before.[12] The court in *Fitzgerald* specifically anticipated the threat posed by suits of this kind. Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion). In these circumstances, the fact that there is "no historical record of numerous

[12] Heretofore, there have been no private civil damages suits initiated or actively litigated while the defendant was serving as President. While there are recorded private civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all were underway before the defendant assumed office. The first two were dismissed by the time the defendant became President; after each took office, the dismissal was confirmed on appeal. *See New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). The Kennedy case was filed while he was a candidate, and was settled after President Kennedy's inauguration, without any discovery against the Chief Executive. *See, Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960).

suits against the President" -- as there was no comparable record before *Fitzgerald* (*id.* at 753 n.33) -- provides no reassurance at all that this case will be an isolated one.

There is no question that the issues raised by this case will have profound consequences for both the Presidency and the Judiciary. The last word on issues of this importance should not be a decision by a splintered panel of a court of appeals -- a decision that is inconsistent with the precedents of this Court and with the constitutional tradition of separation of powers. The Court has recognized that a "special solicitude [is] due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743. The Court should grant review now, to protect those prerogatives.

CONCLUSION

For the foregoing reasons, we respectfully request that the President's petition for writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee - Cross-Appellant,

v.

William Jefferson Clinton,

Appellant - Cross-Appellee.

Danny Ferguson, Defendant.

United States of America; Akhil Reed Amar, Southmayd Professor of Law Yale Law School; Susan Low Bloch, Professor of Law, Georgetown Law School; Harold H. Bruff, Donald Phillip Rothschild Research Professor, George Washington University National Law Center; Susan Estrich, Robert Kingsley Professor of Law and Political Science, University of Southern California Law Center; Richard H. Fallon, Jr., Professor of Law, Harvard Law School; Daniel A. Farber, Henry J. Fletcher Professor & Associate Dean, University of Minnesota Law School; Philip P. Frickey, Faegre & Benson Professor, University of Minnesota Law School; Paul D. Gewirtz, Potter Steward Professor of Constitutional Law, Yale Law School; Gerald Gunther, William Nelson Cromwell Professor, Stanford Law School; John C. Jeffries, Jr., Emerson G. Spies Professor and Horace W. Goldsmith Research Professor and Academic Associate Dean, University of Virginia School of Law; Sanford Levinson, W. St. John Garwood & W. St. John Garwood Jr. Regents Chair in Law, University of Texas School of Law;

Burke Marshall, Nicholas deB. Katzenbach Professor Emeritus, Yale Law School; Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center; Suzanna Sherry, Earl R. Larson Professor, University of Minnesota Law School; Steven H. Shiffrin, Professor of Law, Cornell Law School; Kathleen M. Sullivan, Professor of Law, Stanford Law School; Laurence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School; The American Civil Liberties Union Foundation; Stephen B. Burbank, Robert G. Fuller, Jr. Professor of Law, University of Pennsylvania Law School; William Cohen, C. Wendell and Edith M. Carlsmith Professor of Law, Stanford University Law School; Larry Kramer, Professor of Law, New York University Law School; Deborah J. Merritt, Professor of Law and Women's Studies, University of Illinois College of Law; Geoffrey P. Miller, Kirkland & Ellis Professor of Law, The University of Chicago Law School; Robert F. Nagel, Ira Rothgerber Professor of Constitutional Law, University of Colorado Law School; Richard Parker, Professor of Law, Harvard Law School; L.A. Scot Powe, Jr., Anne Green Regent Professor of Law, University of Texas Law School; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law; William Van Alstyne, William R. and Thomas C. Perkins Professor of Law, Duke University School of Law,

Amicus Curiae.

Decided and Filed January 9, 1996

Appeals from the United States District Court
for the Eastern District of Arkansas

Before BOWMAN, ROSS, and BEAM, Circuit Judges.

BOWMAN, Circuit Judge.

We have before us in this appeal the novel question whether the person currently serving as President of the United States is entitled to immunity from civil liability for his unofficial acts, *i.e.*, for acts committed by him in his personal capacity rather than in his capacity as President. William Jefferson Clinton, who here is sued personally, and not as President, appeals from the District Court's decision staying trial proceedings, for the duration of his presidency, on claims brought against him by Paula Corbin Jones. He argues that the court instead should have dismissed Mrs. Jones's suit without prejudice to the refiling of her suit when he no longer is President. Mr. Clinton also challenges the District Court's decision to allow discovery to proceed in the case during the stay of the trial. Mrs. Jones cross-appeals, seeking to have the stays entered by the District Court lifted, so that she might proceed to trial on her claims.[1] We affirm in part and reverse in part, and remand to the District Court.[2]

[1] In addition to staying the trial on Mrs. Jones's claims against Mr. Clinton, the District Court also stayed trial against Mr. Clinton's co-defendant in the suit, Arkansas State Trooper Danny Ferguson.

[2] In addition to the briefs of the parties, amicus briefs have been filed in support of Mr. Clinton by the United States and by a group of law professors including Professors Amar, Bloch, Bruff, Estrich, Fallon, Jr., Farber, Frickey, Gewirtz, Gunther, Jeffries, Jr., Levinson, Marshall, Resnik, Sherry, Shiffrin, Sullivan, and Tribe; and in support of Mrs. Jones by The American Civil Liberties Union Foundation and by a group of law profes-

On May 6, 1994, Mrs. Jones filed suit in the District Court against Mr. Clinton and Danny Ferguson, an Arkansas State Trooper who was assigned to Mr. Clinton's security detail during his tenure as governor of Arkansas, for actions alleged to have occurred beginning with an incident in a Little Rock, Arkansas, hotel suite on May 8, 1991, when Mr. Clinton was governor and Mrs. Jones was a state employee. Pursuant to 42 U.S.C. § 1983 (1988), Mrs. Jones alleges that Mr. Clinton, under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her. She further alleges that Mr. Clinton and Trooper Ferguson conspired to violate those rights, a claim she brings under 42 U.S.C. § 1985 (1988). Her complaint also includes two supplemental state law claims, one against Mr. Clinton for intentional infliction of emotional distress and the other against both Mr. Clinton and Trooper Ferguson for defamation.

Mr. Clinton, asserting a claim of immunity from civil suit, filed a motion to dismiss the complaint without prejudice to its refiling when he is no longer President or, in the alternative, for a stay of the proceedings for so long as he is President. On December 28, 1994, the District Court, rejecting the application of absolute immunity, denied Mr. Clinton's motion to dismiss the complaint. The court did find, however, that for separation of powers reasons Mr. Clinton was entitled to a "temporary or limited immunity from trial,"[3] and thus granted his request to stay the trial for the duration of Mr. Clinton's service as President. *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994). Concluding that the claims

sors including Professors Burbank, Cohen, Kramer, Merritt, Miller, Nagel, Parker, Powe, Jr., Presser, Rotunda, and Van Alstyne.

[3] The District Court also justified the stay on the basis of its authority under Rule 40 of the Federal Rules of Civil Procedure and "the equity powers of the Court." *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994).

against Trooper Ferguson are factually and legally intertwined with the claims against Mr. Clinton, the court also stayed the trial against Trooper Ferguson for as long as Mr. Clinton is President, but permitted discovery on Mrs. Jones's claims against both Mr. Clinton and Trooper Ferguson to go forward. On appeal, Mr. Clinton seeks reversal of the District Court's rejection of his motion to dismiss the complaint on the ground of presidential immunity and asks us to order that court to dismiss Mrs. Jones's action in its entirety, without prejudice. In the alternative, he asks this Court to reverse the decision denying his motion to stay discovery. Mrs. Jones cross-appeals the District Court's decision to stay the trial of her claims against both Mr. Clinton and Trooper Ferguson.[4]

Mr. Clinton argues that this suit should be dismissed solely because of his status as President. The immunity he seeks would protect him for as long as he is President, but would expire when his presidency has been completed. The question before us, then, is whether the President is entitled to

[4] Mr. Clinton argues that we do not have jurisdiction to hear Mrs. Jones's cross-appeal from the orders staying the trial, as they are non-final, interlocutory orders. We conclude, however, that Mrs. Jones's cross-appeal is "inextricably intertwined" with Mr. Clinton's appeal, which is before us under the immunity exception to the general rule that only final judgments are appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Thus the orders staying trial are presently appealable under our "pendent appellate jurisdiction." *See Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995) (analyzing *Swint v. Chambers County Commission*, 115 S. Ct. 1203 (1995), and concluding that pendent appellate jurisdiction remains a viable concept in the Eighth Circuit). All issues raised in the appeal and the cross-appeal (with the exception of those portions of the orders concerning the defamation claim against Mr. Clinton, *see infra* note 7) -- the challenges to the non-dismissal of the suit, to the stays of trial, and to the allowance of discovery -- are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency, from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" than these, where answering one question of law resolves them all.

immunity, for as long as he is President, from civil suits alleging actionable behavior by him in his private capacity rather than in his official capacity as President. We hold that he is not.

We start with the truism that Article II of the Constitution, which vests the executive power of the federal government in the President, did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society. As the Supreme Court has observed, "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . . ." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Nevertheless, mindful that for the sake of the nation's general good the Constitution empowers officials to act within the scope of their official responsibilities, the Supreme Court has recognized "that there are some officials whose special functions require a full exemption from liability" for their performance of official acts. *Id.* at 508. The list of those entitled to absolute immunity from civil liability includes the President of the United States for his official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); members of Congress for their legislative acts, regardless of motive, under the Speech and Debate Clause, U.S. Const. art. I, § 6, *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (per curiam); *Tenney v. Brandhove*, 341 U.S. 367, 372, 377 (1951); judges in courts of general jurisdiction for judicial acts, *Stump v. Sparkman*, 435 U.S. 349, 359-60 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); prosecutors for prosecutorial functions, *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); and certain executive officials performing certain judicial and prosecutorial functions in their official capacities, *Butz*, 438 U.S. at 514-15. In addition, witnesses are entitled to absolute immunity from civil suit for testimony given in judicial proceedings, *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983), and even

government officials whose special functions do not require a full exemption from liability may have a more limited qualified immunity for their official acts, *e.g.*, *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (school officials); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (officers of the Executive Branch); *Pierson*, 386 U.S. at 557 (police officers making an arrest). We are unaware, however, of any case in which any public official ever has been granted any immunity from suit for his unofficial acts, and neither the Supreme Court nor any other court, the District Court excepted, appears to have addressed the precise issue before us today: whether the President is entitled to immunity for the duration of his presidency when sued for his unofficial actions.

The immunity that has been found for official acts is not the product of a prudential doctrine created by the courts and is not to be granted as a matter of judicial largesse. *Cf. Imbler*, 424 U.S. at 421 ("[O]ur earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983."). Rather, the question whether to grant immunity to a government official is "guided by the Constitution, federal statutes, and history" and is informed by public policy. *Fitzgerald*, 457 U.S. at 747. "In the case of the President the inquiries into history and policy . . . tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure." *Id.* at 748. Thus the historical "inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers." *Id.*

There is no suggestion in this case that federal legislation is the source of either the immunity Mr. Clinton seeks or an abrogation of a previously declared presidential immunity.

Cf. id. at 748 n.27 (noting that the causes of action in the case were "implied" in the Constitution and federal law, and therefore declining to "address directly the immunity question as it would arise if Congress expressly had created a damages action against the President" for his official acts). Nor is presidential immunity of any kind explicit in the text of the Constitution. Instead, whatever immunity the President enjoys flows by implication from the separation of powers doctrine, which itself is not mentioned in the Constitution, but is reflected in the division of powers among the three branches. *See* U.S. Const. arts. I, II, III. The Supreme Court in *Fitzgerald*, after an exhaustive examination of the history and the constitutional significance of the presidency, held that absolute immunity from civil liability for official acts is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of separation of powers and supported by our history." 457 U.S. at 749. There is a "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743.

The parties agree, and so do we, that the fundamental authority on the subject of presidential immunity is the plurality opinion in *Fitzgerald*. As noted above, the issue before the Court in that case was whether the President is entitled to absolute immunity (rather than qualified immunity or no immunity at all) from personal civil liability for his official acts. By only a five-to-four majority, the Court held that, "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. By definition, unofficial acts are not within the perimeter of the President's official responsibility at all, even the outer perimeter.[5] The Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion, here advanced by Mr. Clinton, that beyond this outer perimeter there is still more immunity waiting to be discovered. We thus are unable to read *Fitzgerald* as support for the proposition that the separation of powers doctrine provides immunity for the individual who serves as President from lawsuits seeking to hold him accountable for his unofficial actions. *See id.* at 759 (Burger, C.J., concurring) ("a President, like Members of Congress, judges, prosecutors, or congressional aides--all having absolute immunity--[is] not immune for acts outside official duties").[6] Moreover, having considered the arguments put forward in the present case, we cannot discern any reason grounded in the Constitution for extending presidential immunity beyond the outer perimeter delineated in *Fitzgerald*. Accordingly, we hold that a sitting President is not immune from suit for his unofficial acts. In this case it is undisputed that most of the acts alleged by Mrs. Jones clearly fall outside the zone of official presidential responsibility, given that they occurred while Mr. Clinton was still governor of Arkansas.[7]

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[5] We note that the dissenting opinion in the present case does not mention *Fitzgerald's* "outer perimeter," much less explain how unofficial acts could come within the protected zone.

[6] The dissenting opinion, while liberally citing and quoting Chief Justice Burger's concurrence, *post* at 27-28, 31 [App. 26-27, 30], does not mention that the Chief Justice expressly stated that the President is "not immune for acts outside official duties."

[7] Mrs. Jones's state law defamation claim concerns actions alleged to have been taken by Mr. Clinton's presidential press secretary while Mr. Clinton was President. The question whether these actions fall inside the "'outer perimeter' of [the President's] official responsibility," *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982), so as to come within the scope of the President's absolute immunity for official acts, is not free from doubt. This particular issue has not been addressed by the District Court, and the record as to the circumstances of the press secretary's statements is not

Stressing that the immunity claimed here is only temporary (until the end of Mr. Clinton's presidency), Mr. Clinton and his amici would have us consider the nature of Mrs. Jones's complaint, as well as the timing of the filing of her suit (apparently just within the statute of limitations), and conclude that her suit is neither important nor urgent, and certainly not consequential enough to trump Mr. Clinton's claim to temporal immunity from suit. But that is not the test. Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws. " The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Mrs. Jones retains that right in her suit against Mr. Clinton, regardless of what her claims may be or when her suit was filed (if otherwise timely filed), provided that she is not challenging actions that fall within the ambit of official presidential responsibility. We further reject the suggestion that Mrs. Jones's motives in filing suit, alleged to be political, should be examined, and that her suit should be dismissed if we are persuaded that her objective in bringing the suit is less than pure. Such an approach would convert a presidential immunity analysis into the taking and weighing of accusations and recriminations, an exercise unnecessary and inappropriate to the proper determination of a claim of immunity based on the Constitution.

Mr. Clinton argues that, if he is presently amenable to suit for his private acts, the proceedings against him inevitably will intrude upon the office of President, in contravention of *Fitzgerald*'s teachings, noting the Court's concern that the "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. Thus, Mr. Clinton

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fully developed. We therefore leave this issue for initial resolution by the District Court after remand and upon a more complete record.

would have us ignore the line that *Fitzgerald* draws between official and unofficial acts and instead "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch," the analysis undertaken by the Court in reaching its decision on the question of presidential immunity for official acts. *Id.* at 754. But the Court in *Fitzgerald* was troubled by the potential impact of private civil suits arising out of the President's performance of his official duties on the future performance of those duties, not by whether the President *qua* individual citizen would have the time to be a defendant in a lawsuit. As the Court explained, "[A] President must concern himself with matters likely to 'arouse the most intense feelings,' " and "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (citations to quoted cases omitted). It is clear from a careful reading of *Fitzgerald* that the justification for the absolute immunity conferred in that case was concern that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process. The rationale of the *Fitzgerald* majority is that, without protection from civil liability for his official acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation but in an effort to avoid lawsuits and personal liability. This rationale is inapposite where only personal, private conduct by a President is at issue.

Mrs. Jones's claims, except for her defamation claim,[8] concern actions by Mr. Clinton that, beyond cavil, are unrelated to his duties as President. This lawsuit thus does not implicate presidential decision-making. If this suit goes forward, the President still will be able to carry out his duties

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[8] *See supra* note 7.

without any concern that he might be sued for damages by a constituent aggrieved by some official presidential act. Though amenable to suit for his private acts, the President retains the absolute immunity found in *Fitzgerald* for official acts, and presidential decision-making will not be impaired. "In defining the scope of an official's absolute privilege, . . . the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.* at 755. We see no connection, much less a close one, between the unofficial actions Mr. Clinton wishes to shield from judicial process and the justifying purposes of presidential immunity as set forth by the Court in *Fitzgerald*.

Mr. Clinton argues that denying his claim to immunity will give the judiciary *carte blanche* to intrude unconstitutionally upon the Executive Branch and in fact will disrupt the performance of his presidential duties and responsibilities. As the argument goes, because a federal court will control the litigation, the Third Branch necessarily will interfere with the Executive Branch through the court's scheduling orders and its powers to issue contempt citations and sanctions. But Mr. Clinton's sweeping claim that this suit will allow the judiciary to interfere with the constitutionally assigned duties of the Executive Branch, and thus will violate the constitutional separation of powers doctrine if immunity is not granted, without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit (and, unlike the dissent, *post* at 30-31, 32 [App. 29-30, 31], we think it is Mr. Clinton's burden to do so), is insufficient ground for granting presidential immunity, even temporarily. *See Butz*, 438 U.S. at 506 ("[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); *cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding no presidential privilege attaches to presidential communications subpoenaed in criminal case when asserted privilege "is based only on the

generalized interest in confidentiality"). We reject Mr. Clinton's argument, and instead focus our attention on the true separation of powers issues, which we already have discussed, upon which the question of presidential immunity hinges.

"[T]he Constitution by no means contemplates total separation of each of [the] three essential branches of Government." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam). Under the checks and balances provided for in the Constitution, all branches have the capacity to intrude in some way upon the province of the other branches. But under the Constitution, and because of those same checks and balances, no one branch may intrude upon another to such an extent that the threatened branch is rendered incapable of performing its constitutionally assigned duties. *See id.* at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."). What is needed, we believe, to avoid a separation of powers problem is not immunity from suit for unofficial actions, an immunity that would accord the President a degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens), but judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule. The trial court has broad discretion to control the scheduling of events in matters on its docket.[9] We have every confidence that the District Court will exercise its discretion in such a way that this lawsuit may move forward with the

[9] Notwithstanding the District Court's broad discretion in matters concerning its own docket, the alternative rationale for the stays the court granted--its power under Federal Rule of Civil Procedure 40 and "the equity powers of the Court," *Jones v. Clinton*, 869 F. Supp. at 699--attempts to justify orders that we consider an abuse of discretion. Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled.

reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties.

The unfettered filing of numerous vexatious or frivolous civil lawsuits against sitting Presidents for their unofficial acts that Mr. Clinton and the dissenting opinion in this case envision if Mr. Clinton is not granted temporal immunity from Mrs. Jones's lawsuit is not only speculative, but historically unsupported. To date no court ever has held that an incumbent President has any immunity from suit for his unofficial actions. Although our Presidents never have been recognized as having any immunity from lawsuits seeking remedies for civil liabilities allegedly incurred by them in their personal dealings, it would appear that few such lawsuits have been filed.[10]

While the President himself and his official conduct inevitably have the high visibility that concerned the Court in *Fitzgerald*, 457 U.S. at 753 (noting "the visibility of [the President's] office and the effect of his actions on countless people" as setting him up as "an easily identifiable target for

[10] The parties have identified only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties. *See also Jones v. Clinton*, 869 F. Supp. at 697. Those suits were against Theodore Roosevelt, Harry S Truman, and John F. Kennedy. In each case, the action was filed before the defendant began serving as President, and the suits against Presidents Roosevelt and Truman were already on appeal before those men assumed the office of President. *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904) (per curiam mem.); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). It does not appear that either Mr. Roosevelt or Mr. Truman claimed any immunity from suit. In the action against Mr. Kennedy, he asserted, post-election, that he was temporarily protected from suit under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-93 (1988 & Supp. V 1993), given his status as Commander-in-Chief. The court denied Mr. Kennedy's motion for a stay, apparently without a written opinion, and the case eventually settled. *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962); *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. 1962).

suits for civil damages"), his unofficial, private conduct is on a different footing. Although such conduct may attract widespread attention when someone elects to make it public, the unofficial acts of the person who serves as President, unlike the President's official acts, are not likely to affect "countless people." Rather, unofficial conduct will affect only those who traffic with the President in his personal capacity. Thus the universe of potential plaintiffs who might seek to hold the President accountable for his alleged private wrongs via a civil lawsuit is considerably smaller than the universe of potential plaintiffs who might seek to hold the President accountable for his official conduct; in the latter case, the plaintiff could be virtually anyone who feels aggrieved by presidential action. If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Finally, we reject the notion that presidential immunity in civil cases seeking a remedy for unofficial acts can be conferred on an *ad hoc* basis. There is no constitutional basis for the proposition that a court, in its discretion, could refuse to grant immunity to a President in, for example, suits for arrearages in child support or the case of the "more urgent need" of a plaintiff seeking injunctive relief, Appellant's Reply Brief at 21 n. 14, or of a plaintiff who shows exigent circumstances, while granting immunity from suits for declaratory relief or money damages where the plaintiff demonstrates no exigency. A sitting President is either entitled to immunity from suit for his unofficial acts, or he is not. As we have noted, presidential immunity is not a prudential doctrine fashioned by the

courts. Mr. Clinton is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion. The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances. Again, we have every confidence that the District Court will discharge its responsibility to protect the President's role as our government's chief executive officer, without impeding Mrs. Jones's right to have her claims heard without undue delay. If either party believes the court is failing to discharge that responsibility, the proper course is to petition this Court for a writ of mandamus or prohibition.

To sum up, we hold that the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts. Accordingly, we affirm the District Court's decision denying Mr. Clinton's motion to dismiss Mrs. Jones's suit and the decision to allow discovery in this case to proceed. For the same reason, we reverse the District Court's order granting Mr. Clinton's motion to stay the trial of this matter for the duration of his presidency. Mrs. Jones's appeal of the District Court's post-judgment order staying discovery during the pendency of this appeal is dismissed as moot, as is Mr. Clinton's challenge to our jurisdiction to hear that appeal. The case is remanded to the District Court, with instructions to lift the stays that the court has entered and to allow Mrs. Jones's suit against Mr. Clinton and Trooper Ferguson to proceed in a manner consistent with this opinion and the Federal Rules of Civil Procedure.

BEAM, Circuit Judge, concurring specially.

I concur in the conclusions reached by Judge Bowman. I write separately to express my views on three matters which are, in my mind, insufficiently discussed by either the opinion of the court or the dissent.

I.

Mr. Clinton and his amicus vigorously present their position on the potential impact of this civil litigation on the office and the duties of the presidency. And, without question, they raise matters of substantial concern given the constitutional obligations of the office. What is missing from their arguments is a coordinate and balanced analysis of the impact a stay of the litigation, including an embargo on all discovery, will have on Ms. Jones and her claims. This should also be of substantial concern because it involves fundamental constitutional rights governing access to and use of the judicial process under the First and Fourteenth Amendments and the right to a timely jury trial under the Seventh Amendment, to identify only a few specific omissions.

It is incorrect, in my view, for Mr. Clinton and his amicus to assert that the delay is of no consequence to Ms. Jones. Aside from the adage that justice delayed is justice denied, Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time. To argue that this problem may be dealt with by episodic exceptions when the risk of loss is apparent is to miss the point. Only rarely does life proceed in such a foreseeable fashion.

The dissent states, "[w]here there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office." *Infra* at 30 [App. 29]. The dissent urges total abeyance of both discovery and trial. I perceive this, perhaps incorrectly, to be an implicit finding that there is, indeed, no real urgency to Ms. Jones's suit for civil damages and, thus, the

constitutionally based separation of powers doctrine *demands* that this litigation, in all of its manifestations, be abated until Mr. Clinton leaves office -- this to protect the constitutional grant of executive authority given to a sitting President. In my view, this greatly oversimplifies the issues in this appeal and overstates the danger to the presidency. The potential for prejudice to Ms. Jones, as earlier noted, reaches, or at least approaches, constitutional magnitude. If a blanket stay is granted and discovery is precluded as suggested by Mr. Clinton and his amicus, Ms. Jones will have no way that I know of (and none has been advanced by those counseling this course of action),[1] to perpetuate the testimony of any party or witness should they die or become incompetent during the period the matter is held in abeyance. Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal.

It is true that some of Ms. Jones's claims would survive to her guardian, heirs or assigns in the event of her incompetence or death, assuming a way is found to preserve crucial evidence. Her claim of defamation is in a different class. It almost certainly would be totally extinguished should either party die. This would also include her defamation claims asserted against Trooper Ferguson.

From the pleadings, the forum law applicable to her defamation claims is not easily discernible and I have not canvassed the law in every conceivable jurisdiction. It seems appropriate to note, however, that under Arkansas law, for example, the defamation claims would expire on the death of either party. *See* Ark. Code Ann. § 16-62-101(b) (Michie 1987 & Supp. 1993); *Parkerson v. Carrouth*, 782 F.2d 1449,

[1] Only the amicus brief filed by the Solicitor General fleetingly mentions this problem, but it offers no solutions.

1451-53 (8th Cir. 1986). I think Arkansas expresses the rule of most jurisdictions. Accordingly, one can readily see the irreparable harm that a stay of this claim (assuming its viability as we must at this point) will bring to Ms. Jones. Thus, the total stay requested by Mr. Clinton and his amicus, and embraced by the dissent, will immediately produce a threat of irreparable injury.

Even though a sitting President is not immune from liability for his nonofficial conduct, it is fair to note that some of Ms. Jones's defamation claims, as presently alleged, may well fit within the "outer perimeter" of official responsibility as discussed in *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). Thus, at the very least, absolute immunity defenses to these claims should be immediately taken up and decided by the district court.

The dissent appears to recognize the potential for irreparable harm to Ms. Jones and proposes that her interests -- as balanced against the interests of Mr. Clinton -- be analyzed and weighed by shifting the burden of establishing "irreparable injury" to Ms. Jones, *along with* the additional burden on Ms. Jones of showing "that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office." *Infra* at 30-31 [App. 29-30]. The dissent cites no established authority or case precedent for this burden-shifting strategy, even by analogy to some reasonably comparable situation. I have discovered none. In this regard, there is no way, in my view, that a litigant could ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited. To determine, as a precondition to "immediate adjudication," that at some future time the lawsuit will not significantly impair the duties of the President would be an impossible task. Thus, the dissent's proposed safety valve is valueless, except in its recognition of the potential for irreparable harm to Ms. Jones caused by the total stay.

Notwithstanding the separation of powers concerns outlined by the dissent, the burden, in my view, should be shouldered, as in any other civil litigation, by the party seeking to delay the usual course of discovery and trial. Otherwise, we will have established requirements of insurmountable proportions for any litigant who may have a viable and urgent civil claim against a sitting President or perhaps, against other important governmental figures with constitutionally established duties.

This approach to staying litigation is a well-established legal concept. Traditionally, an applicant for a stay has the burden of showing specific hardship or inequity if he or she is required to go forward. *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). This may be a *sub silentio* recognition of the terms of the Seventh Amendment. However, great public interest may authorize a stay which is not immoderate or oppressive in its consequences. *Id.* at 256. Thus, while there is a balancing to be done, the presumption is on Ms. Jones's, not Mr. Clinton's, side. When stays are granted, after the petitioner for the stay meets his "heav[]y" burden of showing "the justice and wisdom of a departure from the beaten track," they must be narrowly tailored or they will amount to an abuse of discretion. *Id.* Of course, the justice and wisdom of such a departure will take into account, in this case, that one of the parties is the sitting President of the United States. *See generally United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990). Nonetheless, I agree with Judge Bowman that Mr. Clinton should carry this initial burden, not Ms. Jones.

In determining whether to stay the litigation, Ms. Jones must be given the benefit of the concept that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, *whenever* [s]he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161 (1803) (emphasis added). More recently, and explicitly, access to the courts has been held to be a

"fundamental constitutional right" founded in the Due Process and Equal Protection clauses. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977). This right is pivotal to our system of governance in that "civil rights actions [such as the 42 U.S.C. § 1983 action at issue here] are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Id.* at 827 (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969)).

Surely, if civil rights actions are of such importance that they may not be impeded or delayed by a person's incarceration, there must be at least an equal public interest in an ordinary citizen's timely vindication of his or her most fundamental right against alleged abuse of power by governmental officials. As noted, Ms. Jones has, in part, brought a 42 U.S.C. § 1983 action, not a mere run-of-the-mill tort claim. The violation of civil rights through the abuse of state government positions of power has been of such great public concern that Congress felt it necessary to enact section 1983 to protect the citizenry and to hold persons with positions of power accountable for its abuse. Thus, this is not a minor civil dispute to which one can assign *no* public interest beside that on the side of the presidency. The balance to be considered, therefore, is not completely one sided. There is a public interest, as well as an individual interest, on Ms. Jones's side of the scale. These interests are of such weight that, at least provisionally, Ms. Jones is entitled to proceed.

II.

I now turn to the potential impact upon the duties of the presidency. The dissent eloquently and properly raises several unanswered questions, *infra* at 29-30 [App. 28-29], concerning judicial branch interference with the functioning of the presidency should this suit be allowed to go forward. Again, I readily admit that these are matters of major concern. In my view, however, these concerns for interbranch interference are greatly overstated by Mr. Clinton and his amicus.

Indeed, they are not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government. Judge Bowman notes at least three earlier instances in which sitting Presidents have been involved in civil litigation outside of official presidential duties. *Supra* at 14 & n.10 [App. 14 & n.10]. Also in the past, under appropriate circumstances "several American Presidents and former Presidents have given testimony under oath in judicial or quasi-judicial settings." 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 7.1 at 572 (2d ed. 1992). Former and sitting Presidents have previously submitted, either voluntarily or involuntarily, to questions under oath. *Id.* By doing so, they implicitly submitted to the common law rule, expressed by Lord Hardwicke, "that the public has a right to every man's evidence" 8 John H. Wigmore, *Evidence* § 2192, at 71 (John McNaughton ed. rev. 1961) (quoting 12 Cobbett's Parliamentary History 675, 693 (1942)).

> Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of *chief executive* of a state?
>
> There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice.

Id. at § 2370(c) (emphasis in original).

As a sitting President, Richard Nixon was a defendant in at least two civil actions. In one, Mr. Nixon was ordered by the Supreme Court to produce tapes subpoenaed by a special prosecutor. *United States v. Nixon*, 418 U.S. 683, 713 (1974). In the other, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) the court held that a President is amenable to legal process, even in his official capacity, if

absolutely necessary. Mr. Nixon did not appeal that determination.

Also, as noted by Rotunda and Nowak, President Jimmy Carter gave videotaped testimony during his presidency that was presented at the criminal conspiracy trial of two Georgia state officials. *See* 1 Rotunda & Nowak § 7.1 at 575. Later, then-sitting President Carter provided videotaped testimony for a grand jury investigating charges that Robert Vesco had enlisted White House aid to quash extradition proceedings against him. *Id.* Finally, still-sitting President Carter was interviewed under oath by Justice Department investigators probing "for criminal, civil, and administrative purposes" any offenses resulting from Billy Carter's relations with the Libyan Government. *Id.* Further, President Gerald Ford was *compelled* to testify by videotape deposition in the criminal trial of Lynette (Squeaky) Fromme, who was charged with attempting to assassinate the President. *Id.* at 581. There are numerous other instances in which a *sitting* President has both voluntarily or involuntarily appeared at judicial proceedings and before committees of Congress. Such instances have involved, at least, Presidents Thomas Jefferson, James Monroe, Abraham Lincoln and Ulysses S. Grant. *See id.* § 7.1.

I concede that most of these situations have arisen within the framework of governmental operations. I further concede that there is not a perfect fit between the interests at play in the cited interbranch proceedings and the civil litigation at issue here. My point is that each named President has obviously scheduled these encounters without creating a cataclysmic episode in which the constitutional duties of the office have been compromised.

Ms. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President

and Ms. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of the litigation with maximum consideration of the President's constitutional duties.

III.

My final concern involves Trooper Danny Ferguson. Even assuming, for sake of argument, the validity of every constitutional claim or defense advanced by Mr. Clinton, I can find no basis for staying discovery or trial of the claims against Trooper Ferguson. Whether private citizen or President, it is unlikely that Mr. Clinton would choose to be present at the deposition of Trooper Ferguson or any sundry witness; certainly he would not be required to attend and no prejudice is likely to result from his absence. Neither would he need to be directly concerned with other discovery directed to Trooper Ferguson although it might, admittedly, affect his interests. Even so, I find no separation of powers or other constitutional basis for a stay for this portion of the litigation, especially the discovery process.[2]

IV.

I in no way seek to downplay the concerns outlined by the dissent. At the same time, I feel that Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the

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[2] Any problems that arise from attempts by Trooper Ferguson to depose or otherwise conduct discovery from Mr. Clinton, if resisted, are, in my view, separate from the issues raised in this appeal.

rights of any party. As I have attempted to stress, nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled. With this understanding, I concur.

ROSS, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion. Instead, I would affirm the judgment of the district court concluding that the civil action should not be dismissed, but stayed during the President's term in office. Further, I would reverse the district court's conclusion allowing discovery to proceed.

In my opinion, the language, logic and intent of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), although set in the context of official acts, applies with equal force to the present factual scenario and directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term.

The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts. The *Fitzgerald* Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages. The Court stated, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751.

This "diversion of energies" argument refers not only to the concern with whether the President will execute his official duties in a fearless and impartial manner, but also recognizes that the "President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." *Id.* at 749, 750. Article II, § 1 of the Constitution uniquely vests the entire executive power in the President. No other branch of government is entrusted to a single person. It is this singularity of the President's constitutional position that calls for protection from civil litigation.

The unofficial nature of the alleged events would not make defending a private suit for civil damages any less of a burden on the President's time and attention and therefore on his constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. When the President is called upon to defend himself during his term of office, even in actions wholly unrelated to his official responsibilities, the dangers of intrusion on the authority and functions of the Executive Branch are both real and obvious. The burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result would disserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution.

Further, the *Fitzgerald* majority was concerned with the possibility that the "sheer prominence of the President's office" makes a President "an easily identifiable target for suits for civil damages." *Id.* at 752-53. In his concurrence, Chief Justice Burger noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763 (Burger, C.J., concurring). While stated in the context of official acts, Chief

Justice Burger's concurrence applies with equal force to the present case:

> The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. . . . When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.

Id. at 763 (Burger, C.J., concurring).

The same concerns are implicated in the present action as well, where such suits could be pursued merely for the purpose of gaining partisan political disruption, public notoriety, unwarranted financial gain, or potential extortion. Indeed, any number of potential private claims could be contrived to entangle a sitting President in embarrassing or protracted litigation, alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of a pretrial motion.

The *Fitzgerald* Court also recognized that presidential immunity is "rooted in the separation of powers under the Constitution." *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)). The Court noted that the Framers of the Constitution assumed that "the President personally, was not the subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Id.* at 751 n.31 (quoting Journal of William Maclay 167 (E. Maclay ed. 1890) (alteration in original). Quoting Thomas Jefferson, the Supreme Court further underscored its concern that exercising jurisdiction over a President would

create the opportunity for unconstitutional judicial intrusion upon Executive authority:

> [W]ould the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

Id. (quoting 10 The Works of Thomas Jefferson 404 (P. Ford ed. 1905)).

In my view, the separation of powers doctrine requires that private civil actions against a sitting President for unofficial acts must be stayed during the President's term in office. Civil lawsuits against a President create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes. It cannot be denied that the potential for such conflicts is inherent in subjecting any President personally to a court's jurisdiction.

The majority concludes the remedy for interference with the performance of the President's official duties by the demands of discovery and trial preparations and proceedings is the filing of motions with the court for rescheduling, additional time or continuances. *Ante* at 16 [App. 16]. If this route proves to be unsuccessful, the majority suggests the President should be required to petition this Court for a writ of mandamus or prohibition, *id.*, and arguably then to appeal any adverse decision to the Supreme Court. This suggestion, however, clearly epitomizes the separation of powers conflict inherent in a system that subjects a sitting President personally to the court's jurisdiction for the purpose of private civil litigation.

The majority's decision leaves as many questions unanswered as it answers: Must a President seek judicial approval each time a scheduled deposition or trial date interferes with the performance of his constitutional duties? Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? Finally, can a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict? While the majority would encourage other courts to exercise "judicial case management sensitive to the burdens of the presidency," *ante* at 13 [App. 13], only a stay of civil litigation during a President's term in office will ensure the performance of Executive duties unencumbered by the judiciary and thereby avoid separation of powers conflicts.

While noting that the separation of powers doctrine "does not bar every exercise of jurisdiction over the President of the United States," *Fitzgerald*, 457 U.S. at 753-54, in view of the significant encroachment upon presidential duties and independence that would necessarily accompany litigation, the *Fitzgerald* Court admonished that, before asserting such jurisdiction, a court "*must* balance the constitutional weight of the interest to be served [by the litigation] against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754 (emphasis added) (citing *Nixon v. GSA*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. at 703-13)).

Where there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office. The cause of action should be stayed unless the plaintiff can show that he or she

will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office.

It is important to keep in mind that the issue here is not *whether* the President may be required to answer claims based on unofficial conduct, but *when*. This conclusion merely delays, rather than defeats, the vindication of the plaintiff's private legal interests, and thus is far less burdensome for a plaintiff than the absolute immunity recognized in *Fitzgerald*. A stay for the duration of the President's service in office would not prevent Jones from ultimately obtaining an adjudication of her claims. Rather, staying the litigation will protect the important public and constitutional interests in the President's unimpaired performance of his duties, while preserving a plaintiff's ability to obtain resolution of his or her claims on the merits. Postponing adjudication of private damage actions will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief. "[W]e do well to bear in mind that the focus must not be simply on the matter of judging individual conduct in a fact-bound setting; rather, in those familiar terms of John Marshall, it is a *Constitution* we are expounding. Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages." *Id.* at 758-59 (Burger, C.J., concurring).

The well-known travail of litigation and its effect on the ability of the President to perform his duties, as well as the subjection of the President to the ongoing jurisdiction of the courts and the attendant impact on the separation of powers, dictate the postponement of non-exigent, private civil damages litigation until the President leaves office.

In my opinion, the stay should include pretrial discovery, as well as the trial proceedings, because discovery is likely to pose even more intrusive and burdensome demands on the

President's time and attention than the eventual trial itself. Similarly, I would grant a stay of proceedings against a co-defendant of a sitting President where, given all the circumstances, the claims against the co-defendant cannot proceed without materially diminishing the effectiveness of a stay of proceedings against the President. I agree with the district court's conclusion here that a stay of the claims against Trooper Ferguson is essential if the President is to be fully protected.

Out of respect for the separation of powers and the unique constitutional position of the President, I conclude the President ordinarily should not be required to defend himself against civil actions until after the completion of his service in office. Therefore I would hold that to rebut the presumption that private suits against a sitting President should not go forward during the President's service in office, the plaintiff should have to demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Absent such a showing, the litigation should be deferred.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Plaintiff - Appellee,

v.

William Jefferson Clinton,

Defendant - Appellant,

Danny Ferguson,

Defendant,

United States of America, et al.,

Amicus Curiae.

Decided and Filed March 28, 1996

Appeal from the United States District Court
for the Eastern District of Arkansas

The suggestion for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Murphy took no part in the consideration or decision of this case.

McMILLIAN, Circuit Judge, dissenting from the denial of the suggestion for rehearing en banc.

The majority opinion not only has put short pants on President William Jefferson Clinton, but also has succeeded in demeaning the Office of the President of the United States,

recognized throughout the world as the most powerful office in the world, an office which, at this time, is grappling with world problems in Bosnia, Iran, China, Taiwan, Cuba, Russia, and most third-world nations, not to mention the myriad of domestic problems here at home. Never has there been a question of whether President Clinton is above the law and immune from suit, the question is only "when?" My colleagues, to my dismay, would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the appellant delayed filing for at least *three* years.

The panel opinion is this case unfortunately misinterprets the principles enunciated in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (*Fitzgerald*). The panel opinion will allow judicial interference with, and control of, the President's time, at least in part. The ruling thus violates the separation of powers doctrine and should be reviewed by this court en banc. I dissent from the court's refusal to do so.

My reading of *Fitzgerald* discloses two separate rationales for the immunity granted to former President Richard Nixon. The first rationale focuses on the "public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). This rationale reflects the concern that the threat of a lawsuit could interfere with the President's ability to carry out his or her official duties. *Id.* "Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32. This is the official action rationale which confers immunity to a president from lawsuits even after completion of his or her term of office.

The second rationale applies to lawsuits, such as the present one, filed during the President's term but arising from conduct or events which are unrelated to the President's offi-

cial duties. This rationale is not based upon the need for fearless and impartial decision making by the President but rather is based upon the need to allow the President to carry out his or her official duties free from unnecessary interference and distraction. As the Court stated in *Fitzgerald*, "[i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id.* at 753. The historical discussion of presidential immunity in note 31 of the *Fitzgerald* opinion emphasizes that such immunity rests in large measure on avoiding distractions from the official duties of the President. In part that note provides:

> Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits. 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-419 (1st ed. 1833) (quoted *supra*, at 2701-2702). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States v. Burr*, 25 F.Cas. 30 (No. 14,692d) (CC Va. 1807), that a subpoena *duces tecum* can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President: "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each

> branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404 n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original).

Id. at 750 n.31.

Judge Beam's concurring opinion in the present case illuminates the problem of judicial interference with the President's official duties. The consequence of the panel's decision is that now there will be a trial judge exercising some control over the President's schedule. As Judge Beam concludes:

> I in no way seek to downplay the concerns outlined by the dissent. At the same time, I feel that Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the rights of any party. As I have attempted to stress, *nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled. With this understanding, I concur.*

Slip op. at 25 (emphasis added). Conversely, however, nothing prohibits the trial judge from ordering the President to appear, testify, provide discovery, answer numerous interrogatories and requests for admissions at the trial judge's almost unrestricted discretion. Indeed, figuratively, the courts may "bandy him from pillar to post." If that does not violate the separation of powers between the President and the judiciary, what does?

The Constitution of the United States provides in Article II, Section 1, "The executive power shall be vested in the President of the United States of America." Even assuming a trial judge of reasonably good judgment, judicial control over the sitting President of the United States as a defendant in an ongoing civil lawsuit must constitute a far greater affront to our separation of powers principles than that which was at stake in the *Fitzgerald* case, where the defendant was not a sitting president.

In my opinion, Judge Ross got it exactly right when he wrote in his dissent:

> The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts.

Slip op. at 26.

Finally, the impact of the limited presidential immunity sought here by President Clinton is far less drastic than the immunity granted to former President Nixon in *Fitzgerald*. Although President Nixon was no longer in office at the time of that lawsuit, his immunity was absolute. It left the plaintiff without any remedy. That is not the case here. The appellant in the present action can pursue her claims after President Clinton leaves office. While delay may be unfortunate for the appellant, it is not necessarily prejudicial. She still retains her right to sue.[1] What must be of greatest concern in this contro-

[1] Clearly, if the President were granted limited immunity from suit for the duration of his presidency, the applicable statute of limitations would be tolled for the same time period.

versy is the welfare of this nation -- and indeed of the entire world -- over which the President of the United States exerts such strong influence as "the officeholder [who] make[s] the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Fitzgerald*, 457 U.S. at 752.

Although this court has refused to consider this important case en banc, I have every confidence that the issues of national concern in this case relating to the judiciary's relationship to the presidency will command the attention of the United States Supreme Court.

March 28, 1996

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellant/cross-appellee's motion to stay the mandate of this court is granted pursuant to Federal Rule of Appellate Procedure 41(b).

The issuance of the mandate in this case shall be stayed to and including May 16, 1996. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

April 16, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

President Clinton's motion to extend the stay of mandate has been considered by the Court and is denied. Judge Ross voted to grant the motion.

May 8, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed July 21, 1994

MEMORANDUM AND ORDER

Plaintiff Paula Corbin Jones seeks civil damages from the President of the United States for actions that, with one exception, are alleged to have occurred prior to his assuming office. The matter is before the Court on motion of the President for permission to file a motion to dismiss on grounds of Presidential immunity and to defer the filing of any other motions or pleadings until such time as the issue of immunity is resolved. The plaintiff has responded in opposition to the motion.[1] For the reasons that follow, the Court finds that the President's motion should be and hereby is granted.

I.

This complaint, which was filed on May 6, 1994, arises out of an alleged incident that is said to have occurred on May

[1] During a telephone conference held on June 16, 1994, separate defendant Danny Ferguson stated that he had no position with respect to the matter now before the Court.

8, 1991, when President Clinton was Governor of the State of Arkansas. The plaintiff was a state employee at the time, and she claims that the President sexually harassed and assaulted her during a conference being held at a hotel in Little Rock, Arkansas.

The plaintiff asserts four claims in her complaint against the President. In Counts I and II, she alleges that President Clinton conspired to and did deprive her of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution. She contends that the President discriminated against her because of her gender by sexually harassing and assaulting her, by imposing a hostile work environment on her, and by causing her to fear that she would lose her job. She further claims that she was subjected arbitrarily to the fear of losing her job or experiencing other adverse actions in relation to her job and work environment. In Count III, plaintiff asserts a claim of intentional infliction of emotional distress or outrage, and claims in Count IV that the President, through his press aides and attorney, defamed her by denying the allegations that underlie this lawsuit.[2]

The President informs the Court that he will file a motion to dismiss the complaint without prejudice to its reinstatement after he leaves office, on grounds that sitting Presidents are constitutionally immune from having to litigate private suits for civil damages. He states that the immunity motion will raise serious issues which go to the constitutionality of compelling a sitting President to litigate private civil damages claims, as well as to this Court's authority to proceed in this case in the first instance. The President argues the Court should allow him initially to assert the immunity issue alone, thereby permitting that question to be resolved prior to filing any other pleadings in the case.

[2] Plaintiff also asserts conspiracy and defamation claims against separate defendant Ferguson.

II.

The President states that his immunity motion will be based substantially on the Supreme Court's decision in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), a case decided on a narrow 5-4 margin. The plaintiff in that case, a former employee of the Department of the Air Force, had alleged that then-President Nixon abolished his position in retaliation for his testimony before a Congressional Committee. The District Court rejected President Nixon's claim of immunity, and the Court of Appeals dismissed his collateral appeal. The Supreme Court granted certiorari to decide the "important issue" of Presidential immunity. 457 U.S. 731, 741. Referring to the plaintiff's claim as "this merely private suit for damages," *id.* at 754, the Court held that "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. In so holding, the Court identified immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

Fitzgerald involved official actions by a sitting President while the allegations here relate to conduct that purportedly occurred prior to President Clinton's assumption of office. The President acknowledges this distinction and states that his motion will not assert absolute immunity such as was afforded in *Fitzgerald*, but will recognize the plaintiff's right to reinstate the lawsuit after he leaves office. In asserting such a claim of immunity, the President will seek entitlement to a fundamental protection from suit previously unrecognized in any court. This claim may or may not succeed. Nevertheless, because of the "singular importance of the President's duties," *Fitzgerald*, 457 U.S. at 751, and because suits for civil damages "frequently could distract a President from his public duties, to the detriment of not only the President and his office

but also the Nation that the Presidency was designed to serve," *id.* at 753, the Court concludes that the issue of Presidential immunity deserves threshold consideration, prior to the filing of any other motions or pleadings.

In allowing the President to first assert the issue of immunity, the Court is permitting a procedure that is entirely consistent with the principles underlying absolute immunity. The "essence of absolute immunity is its possessor's entitlement not to have to answer for his [alleged] conduct in a civil damages action." *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985) (citing *Fitzgerald*, 457 U.S. 731). "The entitlement is an *immunity from suit* rather than a mere defense to liability," and "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (Emphasis in original.) *See also Siegert v. Gilley,* 500 U.S. 226, 232 (1991) (noting that one of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending an extended lawsuit); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687 (1993) (same). Because the entitlement is an immunity from suit, the Supreme Court has stressed that immunity questions should be resolved at the earliest possible stage in litigation. *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991).

Moreover, the immunity that will be asserted in this case is of a unique character and does not require an analysis of the allegations of the complaint. The Court thus has no need for dispositive motions at this time. Were the President asserting a defense of qualified immunity, the Court might well agree with the plaintiff that the substantive allegations of her complaint must be addressed. In such cases, courts are required to determine whether the alleged actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To decide whether an official is protected by qualified immunity, a court must determine whether the

official's action was objectively legally reasonable in the light of the legal rules that were clearly established at the time the action occurred. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). This inquiry involves a two-step process. First, the court must determine as a threshold matter whether the plaintiff has alleged a violation of a constitutional right. *Munz v. Michael*, No. 93-1865, 1994 WL 288376, at *4 (8th Cir. July 1, 1994) (citing *Beck v. Schwartz*, 992 F.2d 870, 871 (8th Cir. 1993) (per curiam)). *See also Siegert*, 500 U.S. at 232. Second, the court must determine whether that constitutional right was clearly established at the time that the officials acted. *Munz*, 1994 WL 288376, at *4 (citing *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993)).

The immunity that will be asserted by the President, however, is premised on his status as President and does not require the Court to review the legal sufficiency of the complaint. Indeed, the allegations of the complaint are irrelevant. This Court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law." *Forsyth*, 472 U.S. at 528.[3]

Nevertheless, plaintiff argues that the Federal Rules of Civil Procedure require every defendant, including the President of the United States, to either answer a complaint or file a single dispositive motion raising all available grounds for dismissal, including absolute immunity. Certainly, that is one way to handle a case, but it is not the only way it can be done.

[3] It is true that for some officials, the question of absolute immunity will depend upon the particular function the official is performing. Such an inquiry involves application of a "'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993) (citations omitted). In such cases, it may be necessary to examine the substantive allegations of the complaint. In the case at bar, however, the immunity that will be asserted by the President is premised on his status as President and does not require application of the "functional approach."

Plaintiff asserts, however, that the briefing schedule sought by the President is "nothing less than a categorical suspension of the Federal Rules of Civil Procedure." To the contrary, Rule 12 specifically allows for successive motions to dismiss for failure to state a claim. *Sharma v. Skaarup Ship Management Corp.*, 699 F.Supp. 440, 444 (S.D.N.Y. 1988), *aff'd*, 916 F.2d 820 (2nd Cir. 1990), *cert. denied*, 499 U.S. 907 (1991). "Although defenses of lack of jurisdiction over the person, improper venue and insufficiency of process are waived if not raised in a party's first responsive pleading, 'A defense of failure to state a claim upon which relief can be granted ... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.'" *Id.* (citing Fed.R.Civ.P. 12(h)). *See also* 2A Moore's Federal Practice ¶ 12.07[3] at 12-102 (2d ed. 1994) (affirmative defenses not enumerated in Rule 12(b) may be made by motion under Rule 12(b)(6)); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 at 447-48 (1990) (Rule 12(b)(6) motions are exempted by Rule 12(g) from the consolidation requirement). The briefing schedule sought by the President is in conformity with the Federal Rules of Civil Procedure and does not afford him privileges unavailable to other defendants.[4]

To be sure, the plaintiff's interest in seeking prompt relief for the alleged violation of her rights is certainly legitimate and not to be minimized. The Court, however, finds that plaintiff's concern that the briefing schedule proposed by the President will entail undue delay is unfounded. Should the

[4] Plaintiff also argues that the cases cited by the President require that every defendant either answer a complaint or file a single dispositive motion raising all available grounds for dismissal. However, the courts in those cases did not specifically require the concurrent filing of all motions but simply addressed the particular procedure in which the litigants before them happened to proceed. Those cases do not stand for the proposition that the briefing schedule proposed by the President is inappropriate or otherwise precluded.

Court deny the President's claim of immunity, such order would be immediately appealable. *Forsyth,* 472 U.S. at 525; *Puerto Rico Aqueduct & Sewer Authority,* 113 S.Ct. at 687. This would be so regardless of the Court's ruling on any other Rule 12(b) motions.

Furthermore, it must be recognized that the relief plaintiff seeks is of a purely personal nature, the delay of which will affect but a single individual who waited two days short of three years in which to file her lawsuit. The President's claim to immunity from suits for civil damages, on the other hand, is equally legitimate and may affect "not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald,* 457 U.S. at 753.[5] Indeed, the amenability of a sitting President to suits for civil damages raises significant and important constitutional issues, the resolution of which will directly impact the institution of the Presidency. That being so, and because the President's constitutional responsibilities and status require this Court to exercise judicial deference and restraint, *Fitzgerald,* 457 U.S. at 753, the Court finds that the President should be allowed to defer the filing of any other motions or pleadings until such time as the issue of immunity has been resolved by this Court.

III.

For the foregoing reasons, the Court will allow the President to file a motion to dismiss on the grounds of presidential immunity on or before August 10, 1994, and to defer and preserve the filing of any other motions or pleadings that may or must be filed under the Federal Rules of Civil Procedure until

[5] As was previously noted, the Supreme Court has expressed concern that suits for civil damages could distract a President from his public duties. *Fitzgerald,* 457 U.S. at 753. In this regard, the Court noted that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. *Id.* at 754 n.37.

such time as the issue of presidential immunity has been resolved by this Court.[6]

IT IS SO ORDERED this 21st day of July 1994.

/s/ Susan Webber Wright

UNITED STATES
DISTRICT JUDGE

[6] Nothing in this Order should be construed as indicating how the Court will rule on the President's soon-to-be-filed immunity motion. This Order only addresses the procedural issue, not the substantive questions relating to immunity.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

The Court is in receipt of amicus briefs which have been submitted for filing in this case. Because the Court has been well briefed by the President, Plaintiff Paula Corbin Jones, and the United States Department of Justice[1] on the issue of presidential immunity, it does not now intend to accept any amicus briefs for filing. Any amicus briefs that are submitted to the Court will be made a part of the correspondence file in the case.

DATED this 27th day of October 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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[1] Pursuant to 28 U.S.C. § 517, the United States filed, on August 19, 1994, a Statement of Interest in this case. Section 517 provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

Separate defendant President Clinton seeks leave to file a reply brief on the issue of presidential immunity. Neither the co-defendant nor the plaintiff objects.

The Federal Rules of Civil Procedure do not provide for the filing of a reply to a response to a motion to dismiss, and district courts are not obligated to consider a reply in such circumstances. The Local Rules do not permit or prohibit filing of replies to responses. Since the Court has not requested a reply brief in this case, the motion is denied.

IT IS SO ORDERED this 27th day of October 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed November 23, 1994

ORDER

On November 1, 1994, separate defendant William Jefferson Clinton filed herein a motion requesting oral argument [Doc. # 28] on the issue of presidential immunity, which is the only issue now before the Court. For the reasons that follow, the motion is denied. Also denied is plaintiff Paula Corbin Jones' motion to file an affidavit under seal [Doc. # 29].

This Court seeks to follow some semblance of order in its conduct of cases. In this case in particular, the Court believes it must keep a tight rein on the proceedings to ensure the case progresses in a timely manner with a minimum of distractions and fanfare. A brief review of recent developments in this case will illustrate the Court's concerns.

The defendant's request for oral argument and the plaintiff's request to file an affidavit under seal are the latest motions that seek actions by the Court which are not part of this Court's usual conduct of cases. It is not the regular practice of this Court to hear oral argument on motions to dismiss.

The Federal Rules of Civil Procedure do not mandate oral arguments on motions at the district court level.[1]

The plaintiff, meanwhile, seeks to file an affidavit under seal, the contents of which may not be disclosed, even to the Court, without the prior approval of the plaintiff. This is an extremely unusual request, and the plaintiff has presented no persuasive argument why it should be granted. Rule 26 of the Federal Rules of Civil Procedure provides for the filing of documents under seal in certain circumstances, but under that rule the court, not the parties, directs when the sealed documents will be opened. There is no provision in the Federal Rules of Civil Procedure for such a filing as the plaintiff requests.

The previous motion for leave to file a reply brief and the submission of amicus briefs were also outside the usual progression of a case in this Court. Neither the federal rules nor local rules of this Court provide for amicus briefs at the district court level or for a reply to a response.[2]

To revisit the facts with regard to the amicus briefs and reply briefs, the last pleading due in this case was a response and brief filed on October 21, 1994, by the plaintiff. On the same date, a motion and amicus brief were submitted by the American Civil Liberties Union, and after the due date of plaintiff's response, another amicus brief was submitted by a group of prominent professors of constitutional law from

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[1] As the Court and parties are aware, the Federal Rules of Appellate Procedure do set forth circumstances in which oral argument will be permitted. *See* Fed. R. App. P. 34.

[2] As the Court and parties are aware, there are provisions in the Federal Rules of Appellate Procedure concerning filing amicus briefs in cases on appeal. *See* Fed. R. App. P. 29. The filing of a reply to a response is not unheard of in this Court, but because such a reply is not provided for in the Federal Rules of Civil Procedure, the Court is not obligated to consider reply briefs in making its rulings unless the Court directs the parties to file the replies.

various American law schools. By recent Order, those two amicus briefs were refused filing with the Clerk of the Court and were placed in a correspondence file available to the Court along with other correspondence which the Court has received about this case. Documents in the correspondence file are not included as part of the official record of the case.[3]

Further, subsequent to the filing by the plaintiff of her response and brief, one of the Court's clerks was contacted by a local attorney for President Clinton, who requested to file a reply brief to the plaintiff's response and who sought a mid-December due date for the reply. Presumably, plaintiff Jones would have wished to file a response to the President's reply brief. The Court would certainly have had to permit the plaintiff to respond if a reply were accepted from the defendant. The Court, acting through the clerk, informed President Clinton's local counsel that the Federal Rules of Civil Procedure do not provide for replies to responses. Through his attorneys, the President then sought leave to file a reply brief, which the Court denied. Presumably, the parties would have wanted to respond to the amicus briefs had they been made a part of the record. It is clear to the Court that without orderly management of this case, briefing could have continued unabated for months.

After this case was filed in May 1994, the Court set up a briefing schedule agreeable to the parties. The amicus briefs were not submitted until the conclusion of that schedule, even though the schedule had been established in mid-summer and was readily available from the Court. Both the questions of

[3] Correspondence relating to cases before the Court is often placed in the official case file. However, in cases which generate correspondence not only from the parties but also from interested members of the public, a separate correspondence file is sometimes maintained. If a district court's decision is appealed, the Eighth Circuit Court of Appeals has discretion to decide whether the correspondence file is sent to the Court of Appeals along with the case file.

reply briefs and oral argument were raised after the briefing schedule had been concluded.

The Court has been thoroughly informed about the issue pending before it as the result of well-researched, well-documented briefs filed herein by the attorneys for the parties and by the Department of Justice.[4] It has received and believes it would benefit from the scholarly amicus briefs submitted.

The Court intends to act on the issue before it in a timely manner, recognizing the extreme importance of the case as well as the intense interest in it. To prolong the decision through oral argument and further briefs would not, in the view of the Court, prove of any benefit to the Court and would only serve to needlessly delay resolution of the issue.

In sum, the defendant's motion for oral argument is denied, and the plaintiff's motion to file an affidavit under seal is denied.

IT SO ORDERED this 23rd day of November 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[4] The United States filed a Statement of Interest in this case on August 19, 1994, pursuant to 28 U.S.C. § 517.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed December 28, 1994

MEMORANDUM OPINION AND ORDER

The Plaintiff, Paula Corbin Jones, filed a damage suit against the Defendants William Jefferson Clinton and Danny Ferguson to recover for acts which were alleged to have taken place primarily while Defendant Clinton was Governor of Arkansas and Defendant Ferguson was a Trooper with the Arkansas State Police assigned to the Governor. Subsequently, in the General Election of November, 1992, Mr. Clinton was elected President of the United States and assumed that office on January 20, 1993.

The complaint was filed on May 6, 1994, and was predicated on an alleged incident which was said to have occurred on May 8, 1991. The action alleged sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, which are provisions included in civil rights legislation of the reconstruction era. It also alleged state law claims of defamation and outrage.

Defendant Ferguson responded to these allegations by, in essence, denying any which might involve questionable ac-

tivities on his part. Defendant Clinton responded with a motion to bifurcate the briefing schedule so as to permit the question of Presidential immunity to be argued on a motion to dismiss before any other questions were presented. On July 21, 1994, the Court entered a Memorandum and Order allowing President Clinton to file a motion to dismiss on the basis of Presidential immunity and deferring and preserving the filing of any other motions or pleadings until the issue of Presidential immunity had been resolved. *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994). The Court noted that this order was purely procedural in nature and addressed only the question of whether Presidential immunity would be considered as a threshold issue. *Id.* at 907 n.6.

The basic issue, therefore, which this Memorandum Opinion and Order addresses is whether a civil action may be asserted against the President of the United States while he is in office when the fact situation alleged in the complaint arose before his election and assumption of office.

I.

Absolute Immunity of the President from Civil Suit

The President has asserted that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office. This, of course, is a claim of absolute immunity. The President would have the Court dismiss the complaint while preserving through some equitable tolling of the statute of limitations the right of Ms. Jones to sue him civilly as soon as he left office. The Justice Department in its Statement of Interest of the United States also argued for immunity, but urged the Court in the alternative simply to stay the proceedings until the President had left office. Ms. Jones argued against immunity, but also argued alternatively for dismissal with an automatic reinstatement on the Court's docket on the last day of his Presidency and against a stay. All briefs discussed at some length the intent of the framers of

the Constitution and interpretations of various scholars and judges relating to this subject, and all were thorough and well researched.

A. The English Legacy

The Court believes that the place to begin this discussion, before coming to the vital question of constitutional interpretation, is in English law and the development of the rights and liberties of the English people. The rights and liberties of England became our inheritance. The Constitution of the United States and the constitutions of the states contain provisions that come directly from that source.

Almost all of the states adopted "reception statutes" receiving into state law the English common law and acts of Parliament as they existed as of a certain date -- which was usually 1607, 1620, or 1776 -- except to the extent that they were contrary to our federal or state constitutions or statutes or were contrary to our form of government. Arkansas adopted such a statute shortly after becoming a state. Ark. Code Ann. § 1-2-119 (Michie 1987); Ark. Stat. Ann. § 1-101 (1976 Repl.); discussed in *Moore v. Sharpe*, 121 S.W. 341 (1909). The statute adopted the English common law, subject to the stated limitations, as it existed prior to the fourth year of James I. Various English statutes or common law rules passed into Arkansas law as a result. *E.g. Biscoe v. Thweatt*, 74 Ark. 545, 86 S.W. 432 (1905) (Statute of Charitable Uses); *Horsley v. Hilburn*, 45 Ark. 458 (1884) (Rule in Shelley's Case implicitly recognized but not applied to fee tail pursuant to superseding Arkansas statute); *Moody v. Walker*, 3 Ark. 140 (1840) (Rule Against Perpetuities). Also received were those portions of the Magna Carta relating to due process of law, equal protection, trial by jury, and rights unrelated to the feudal system.

The Magna Carta was largely a restatement of feudal law pertaining to land tenures and their incidents, and thus most of it has no application here. However, in addition to enshrining

in English law some of our basic rights and liberties, it constituted a series of limitations placed upon the King and his authority. There would follow in English history a long and bloody struggle to define the rights of the monarchy as opposed to Parliament and the citizenry and also to the common law itself.

The tension between the King and Parliament, on the one hand, and the King and the common law, on the other, reached its heights with the ascension to the throne of the Stuart monarchy in the person of King James the First (who was James the Sixth of Scotland). Friction soon arose between the King and the House of Commons. At the root of the disagreement, once again, was the Magna Carta. *See generally* William Swindler, *Magna Carta: Legend and Legacy* 169-176 (1965).

An important participant in all of this was Sir Edward Coke, whose writings had an enormous influence on English and American law, and who had served as Solicitor General and later Attorney General under Queen Elizabeth I and also as Chief Justice of the Court of Common Pleas. He subsequently would become Chief Justice of the King's Bench under King James I. *See* 3 Roscoe Pound, *Jurisprudence* 428 (1959). Under Elizabeth, as her attorney, Coke had been a staunch defender of the Crown, but as a judge, he would quote Bracton to King James: "The King ought to be under no man, but under God and the law." Swindler, *supra*, at 172. He also stated in *Dr. Bonham's Case*, 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (1610): "And it appears in our bodies, that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void" if they are "against common right and reason." William B. Lockhart et al., *The American Constitution* 251 (5th ed. 1981). That was unlikely to be a true statement of the law in the early 17th Century, but to the extent that it was precedent, it may be said to be an early expression of judicial review.

None of this and other frictions set well with the King, and Coke was dismissed from the bench, turning his efforts to Parliament. The continuing friction between Parliament and James' successor, King Charles I, ultimately led to the adoption of the Petition of Right, which in essence ratified and extended the Magna Carta, and in effect further limited the prerogatives of the Crown. A defining moment came when the House of Commons rejected a proposal of the House of Lords that would add a clause recognizing the sovereignty of the King. Coke gave this fulmination:

> I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto -- Magna Carta is such a Fellow, he will have no Sovereign.

Swindler, *supra,* at 185.

The Petition of Right was one of the foundation stones of the English Constitution. It enlarged upon the Magna Carta as a constitutional limitation upon the power of the monarchy. It made it apparent that the King's prerogative was limited. *Sub Deo et Lege*[1] was the law of the land.

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[1] In *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64, 65 (K.B. 1608), Lord Coke wrote:

> [B]ut His Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in

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> safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et lege*. [That the King ought not to be under any man, but under God and the law.]

quoted in DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 203 (1963).

In Catherine Drinker Bowen's book, *The Lion and the Throne*, the situation which led to this opinion is discussed in some detail. The events of this period in English legal and political history were conclusive in determining the end of "the divine right of Kings" and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside of the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution. It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century.

Despite these statements by Lord Coke that the King was subject to the law, there existed contemporaneously in England the rule that "the King can do no wrong," a relic presumably rooted in the divine right of Kings. Blackstone expressed it this way:

> Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute *perfection*. The King can do no wrong: which ancient and fundamental maximum is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.
>
> The King, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Chitty ed. 1855) (emphasis in the original).

B. The American Experience

In the formulation of Article II of the Constitution, there were varying viewpoints as to the office of the President.[2]

Of course, when Blackstone published his *Commentaries,* this idea was already ludicrous in the light of the history of the English monarchy. A litany of the wrongs, weaknesses and sins of English kings would establish that they were not only capable of "doing wrong" but also of "thinking wrong" and were replete with folly and weakness.

The English concept of kingship never entered into the law of the United States, although in England it apparently "exists today to give the Queen an absolute immunity from being sued for personal torts in the civil courts." R.J. Gray, *Private Wrongs of Public Servants,* 47 CAL. L. REV. 303, 307 (1959). *See also* Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique,* 72 Nw. U. L. REV. 526 (1977).

States did not adopt through the reception statutes those aspects of English law relating to the monarchy since kings and queens are contrary to our form of government. Thus what remains of our English heritage on this point are the basic documents of English liberties -- the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights.

Moreover, as Chief Justice John Marshall pointed out in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), the King is subject to being "sued" in the form of a petition "and he never fails to comply with the judgment of his court."

[2] Russell Kirk cites Sir Henry Maine for the proposition that "the office of the President really is the office of a King -- the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." He adds: "Maine even suggests that the framers of the Constitution may have had in mind the powers of George III, when they established the powers of the American presidency." He continues in that vein discussing how powerful an office it is. He adds, however, that the restraint exercised by the first six presidents prevented the reduction of the legislative and judicial branches "to insignificance." RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 427-428 (1974). This seems to be an exaggeration, however, since during that period of time, the opinions of Chief Justice John Marshall sufficed to prevent the Executive Branch from subverting the Judicial Branch, although the first six presidents did exercise substantial restraint, particularly Washington and Adams. It seems much more likely that in providing for

Some, such as Roger Sherman of Connecticut, believed that the President should be "nothing more than an instrument for carrying the will of the Legislature into effect," while others, such as Gouverneur Morris of Pennsylvania, thought the President should be "the guardian of the people, even of the lower classes, against Legislative tyranny." Arthur Schleinger, Jr., *The Constitution: Article II, in An American Primer* 121-22 (Daniel J. Boorstin ed., 1968). What resulted was the compromise that we have today, amended only sightly from the original. It sets out the powers and duties of the Executive Branch (*i.e.,* the President and the administrators he appoints), but it does not address the immunity question.

A large part of the problem, aside from the silence of the Constitution, is that for all practical purposes, the Executive Branch, unlike the Congress and the Supreme Court, consists of only one person. His administrative appointees serve at his pleasure. Thus, a large part of the President's assertion may be summarized in the proposition that, without immunity, to cripple the Presidency in one way or another in civil litigation is to deliver a blow to and weaken the effectiveness of the entire Executive Branch of government which in effect is only one person, the President.

The importance of unimpeded, independent branches of government is discussed by Alexander Hamilton[3] in *The Federalist No. 51:*

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the Executive Branch, the founders did not have George III in mind at all, except in an unfavorable sense. The "George" that they likely had in mind was George Washington. The Executive Branch was probably modeled for the first man to occupy it -- which may explain why even the insertion of an impeachment provision for criminal offenses was a matter of debate.

[3] Some attribute this paper to James Madison. In I THE PEOPLE SHALL JUDGE 312 (University of Chicago Social Science Staff 1949), its author is listed "Hamilton *or* Madison."

Were the executive, magistrate, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal. . . [We must give] to those who administer every department the necessary constitutional means and personal motives to resist encroachments of the others. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I *The People Shall Judge* 312, 313 (University of Chicago Social Science Staff 1949). He is speaking of independence from other branches, but also of the responsibility that goes along with it.

The President and his lawyers, in arguing the immunity issue, seem to place substantial reliance on the intention of the framers of the Constitution. Much of what they argue relates to the impeachment process. For example, they seize in their brief upon this commentary by Hamilton from *The Federalist No. 69:* "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." Of course, Hamilton was talking about *impeachment* under Article II, Section 4, under which the President may be "removed from

Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." That has nothing to do with immunity from civil suit. Article II, and Hamilton, were addressing criminal conduct on the part of the President.

This is not to say, however, that the question of Presidential immunity from suit was not discussed at the Constitutional Convention or during the years immediately following. Justice Lewis Powell addresses this in speaking for the majority of the Court in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982):

> [T]here is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams -- both delegates to the Convention -- that 'the President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.' Journal of William Maclay 167 (E. Maclay ed. 1890).

457 U.S. at 751-52 n.31.

Justice Powell also quoted from Justice Joseph Story's *Commentaries on the Constitution of the United States* to this effect:

> 'There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.' 3 J. Story, Commentaries on the Constitution of the United States Sec. 1563, pp. 418-419 (1st ed. 1833).

457 U.S. at 750.

But just as the English law moved from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law, the situation in American law prior to *Fitzgerald* had proceeded essentially in the same direction with regard to the office of President. For example, it has been pointed out that when Hamilton made the statement quoted previously from *The Federalist No. 69*, "he was referring to his own plan" rather than reciting faithfully what had been proposed. Raoul Berger, *Selected Writings on the Constitution* 46-47 n.94 (1987). Moreover, the discussion at the Constitutional Convention revolved around the impeachment process, the basis for which was the commission of "high crimes and misdemeanors." Although Justice Story, writing several decades later, discusses civil cases, as previously quoted, he is writing from the perspective of someone who was a boy at the time of the Convention -- although admittedly he was rather close in time to those proceedings. He was successful in that what he wrote was embodied in *Fitzgerald*. There was much opposition even to the

impeachment provision; some thought that the Supreme Court should conduct the trial rather than the Senate. James Madison was an advocate of that view, although Gouverneur Morris thought that "no other tribunal than the Senate could be trusted" and believed that the Supreme Court "were too few in number and might be warped or corrupted." 2 *Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 535 (reported by James Madison) (Gaillard Hunt & James Brown Scott, eds., 1987).

The disagreement over Presidential immunity at the Constitutional Convention carried over into the years that followed. In *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), Chief Justice John Marshall ruled that a *subpoena duces tecum* could be issued to President Thomas Jefferson. Jefferson protested strongly, arguing that the three branches of government had to be independent of each other, including independence by the executive from the judiciary. (Discussed in *Nixon v. Fitzgerald*, 457 U.S. at 751 n.31.) In *Livingston v. Jefferson*, 15 F.Cas. 660 (C.C.D. Va. 1811) (No. 8,411), damages were sought for alleged trespass committed by a federal officer at the direction of Jefferson, but a federal court dismissed it for having been brought improperly in Virginia. The immunity issue was not reached. Of course, even before these cases, the argument of total independence of the Executive Branch from judicial action had been settled in large part by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This case is remembered for the recognition and use of judicial review by the Supreme Court of an Act of Congress, but it also directed by mandamus that Secretary of State James Madison deliver Marbury's justice of the peace commission to him contrary to the desires of President Jefferson. While not bearing upon the immunity question directly, it was apparent that the Executive Branch was not immune from action by the Judicial Branch in enforcing mandates of the Constitution. In fact, Chief Justice Marshall said of Marbury's rights and remedies: "The very essence of civil liberty cer-

tainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163.

However, in *Mississippi v. Johnson,* 71 U.S. 475 (1867), the Supreme Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Chief Justice Salmon P. Chase, writing for a unanimous Court, declined to enjoin enforcement of the legislation even though it was allegedly unconstitutional. He distinguished *Marbury* by stating that it only related to *ministerial duties* involving no discretion while these Acts related to "executive and political" duties involving broad discretion. To enjoin the President would be to restrain him from carrying out his constitutional responsibility to execute the laws. Enjoining him would threaten the separation of powers between the branches and the independence of the President. *See similarly, Kendall v. United States,* 37 U.S. 524, 610 (1838), and *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 608-612 (D.C. Cir. 1974).

Of course, the complaint of Paula Corbin Jones in this civil case relates neither to the ministerial nor the executive duties of the President. The allegations relate to alleged conduct of the President while he was Governor of Arkansas. (The allegations, it might be noted, also do not relate to any ministerial or executive duty of the Office of Governor.) The Justice Department, in its brief, stated that it knew of only three private suits based on pre-presidential conduct which had been adjudicated during the President's term in office. These three were (1) an action against Theodore Roosevelt and the Board of Police in New York City, which was resolved in the Board's favor in 1904, *People ex rel. Hurley v. Roosevelt,* 179 N.Y. 544 (1904); (2) A damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, *Devault v. Truman,* 194 S.W.2d 29 (Mo. 1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim

from an automobile accident occurring during the 1960 campaign, which was ultimately settled, *Bailey v. Kennedy,* No. 757,200 (Cal. Super. Ct. 1962).

However, the case most applicable to this one is *Nixon v. Fitzgerald,* cited previously. In a 5-4 decision, the Supreme Court decided that President Nixon had absolute immunity from a suit brought by A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, whom the President ordered fired because he had given congressional testimony on cost overruns which embarrassed his superiors in the Department of Defense (and presumably embarrassed the President also). Fitzgerald sued for damages. The district court rejected President Nixon's assertion of Presidential immunity. The court of appeals affirmed, but the Supreme Court reversed, holding that the President had absolute immunity from a civil suit for damages resulting from official actions taken by the President while in office. The majority opinion of Justice Lewis Powell was hotly disputed in a dissent by Justice Byron White, in which Justices Blackmun, Brennan and Marshall joined. The majority opinion was in accord with the view of the scholar, Edward S. Corwin, in discussing the President's immunity from judicial process. Edward S. Corwin, *The President: Office and Powers* 138 (3d ed. 1948).

But the facts of *Fitzgerald,* as stated previously, are not the same as those in this case. Mr. Nixon was President when he fired Mr. Fitzgerald and was acting in his capacity as the head of the Executive Branch. Mr. Clinton was not President and was not even the President-elect when the alleged cause of action arose in this case.

The Constitution, of course, is silent on all of this. The framers debated even the subject of whether the President should be subject to impeachment for criminal acts and, if so, who should conduct the trial. There is nothing in the document relating to civil actions. Justice Story, *supra*, was of the

mind that the President possessed immunity from civil suit, and the Supreme Court in *Fitzgerald* agreed in a severely divided opinion that the President was civilly immune from suits brought for official actions taken while in office.

Thus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judicial Branch, particularly the Supreme Court. This District Court is not activist in nature and is not inclined to "make law" where none exists. As stated by Chief Justice John Marshall in *Marbury v. Madison,* however: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

This Court recognizes the reasoning of Justice Powell and his thin majority in *Nixon v. Fitzgerald* that the President has absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Therefore, the President's Motion to Dismiss on Grounds of Presidential Immunity is denied.

II.

Limited or Temporary Immunity from Trial

The question does not end here, however, because the intent of the Supreme Court in *Nixon v. Fitzgerald* would seem to carry this case beyond the question of absolute immunity from civil suit. The language of the majority opinion by Justice Powell is sweeping and quite firm in the view that to disturb the President with defending civil litigation that

does not demand immediate attention under the circumstances would be to interfere with the conduct of the duties of the office.

Justice Powell states unequivocally the following: "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. He adds:

> In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

457 U.S. at 754.

Chief Justice Burger expressed the same theme in his concurring opinion: "Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment." 457 U.S. at 762.

Of course, in the preceding part of this opinion, this Court has pointed out that President Clinton's alleged acts took place before he was President and that he was not acting in the scope of Executive authority. Nonetheless, the concerns expressed by a majority of the Supreme Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same -- the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situa-

tion, as stated by Justice Powell in one of the preceding quotations from *Nixon v. Fitzgerald,* could have harmful effects in connection not only with the President but also with the nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident through the alleged negligence of the President and desperately needs to recover such damages as may be awarded by a jury. It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. Her complaint, in ¶¶ 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in *The American Spectator,* in which the author purportedly obtained his information from state troopers, including Defendant Ferguson. Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience. For want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require

due to the fact that the primary defendant is the President. The Court believes that such ruling is also permitted under Rule 40 of the Federal Rules of Civil Procedure allowing district courts to place matters upon the trial calendar "as the courts deem expedient." Further, such limited immunity from trial would seem to be justified under the equity powers of the Court.

By putting the case on hold, as far as trial is concerned, the Court avoids any tolling of the statute of limitations problems which might otherwise be presented if the case were dismissed without prejudice. Despite the fact that the President considers himself estopped to object to a refiling, the Court believes that a delay of the trial is the better way to proceed.

This does not mean, however, that the case is put on the shelf for all purposes. There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself. This approach eliminates the problem that witnesses may die, disappear, become incapacitated, or become forgetful due to the passage of time.

Because there is too much interdependency of events and testimony to proceed piecemeal, the allegations against the trooper will be tried at the same time as those against the President. His case is integrally related to the allegations against the President; both cases arose out of the same alleged incident; and while the suit against the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident, it would not be possible to try the Trooper adequately without testimony from the President.

III.

Conclusion

The Court has attempted to follow its understanding of *Nixon v. Fitzgerald* and other cases as well as to adhere to the

historical framework involved. Most importantly, the Court has sought to give effect to the full meaning of the separation of powers doctrine originally enunciated by Montesquieu and implicit in the founding fathers' structure of the Constitution. Essential Presidential prerogatives are "rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

On the other hand, in situations in which the President was not the holder of his office when the action allegedly arose, there would seem to be no immunity against civil litigation. The rights of Plaintiff Jones as an American citizen must be protected. *Sub Deo et lege* is our law as well as the law of Great Britain. No one, be he King or President, is above the law.

To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office. President Clinton's term in office, if he is re-elected in 1996, would end no later than January 20, 2001. An earlier termination might come on January 20, 1997, which is only slightly over two years away. By permitting discovery as to all including the President, the Court is laying the groundwork for a trial shortly after the President leaves office.

In granting limited or temporary immunity from immediate trial to President Clinton, the Court wishes to emphasize that it holds no brief for alleged sexual harassment, a matter of important concern to many people. The importance of such issue is another reason why there should be no absolute immunity in this case, but only a temporary Presidential immunity from trial.

Finally, the Court must express its awareness that this case is one in which new law is being made. All of the references to historical events and to other cases do not change that

fact. In making such a ruling, the Court is also not unmindful of the fact that to this extent the separation of powers has been breached. But it has happened before in many cases including *United States v. Nixon, supra,* and many of the landmark decisions of Chief Justice John Marshall. In the end, the decision must be made by the courts when there is doubt and only limited precedent.

As previously noted, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury,* 5 U.S. (1 Cranch) at 177. *United States v. Nixon* reaffirmed that statement: "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." 418 U.S. at 707. That is what this Court has tried to do, keeping in mind the words of Chief Justice John Marshall that "we must never forget that it is *a constitution* we are expounding." *McCulloch v. Maryland,* 17 U.S. (4 Wheaton) 316, 407 (1819),[4] and that it is intended to endure for generations and to be applied to the various crises of human affairs.

The President's motion seeking immunity from suit is denied. The court will issue a scheduling order in due course.

IT IS SO ORDERED this 28th day of December 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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[4] As explained by Judge Robert H. Bork, Chief Justice Marshall was pointing out that "there are differences in the way we deal with different legal materials. . . . By this [Chief Justice Marshall] meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, 'partake of the prolixity of a legal code.'" ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990).

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed February 24, 1995

ORDER

On December 28, 1994, this Court entered a Memorandum Opinion and Order denying the motion of Defendant William Jefferson Clinton to dismiss on the grounds of presidential immunity. The Court found, however, that trial of the entire matter should be delayed until after President Clinton leaves office. In spite of ordering a delay in setting the case for trial, the Court found that discovery could proceed as to all persons, including the President.

Both sides have appealed the Court's Order, and President Clinton has filed a Motion for Stay Pending Appeal. Plaintiff has responded in opposition to the motion, and the President has filed a reply to Plaintiff's response. For the reasons stated below, the Court grants the motion for stay.

I.

The denial of the President's motion to dismiss on the grounds of presidential immunity constitutes a "final" order that is immediately appealable under 28 U.S.C. § 1291. An

appeal from a denial of official immunity requires a stay of all proceedings pending resolution of the appeal. As stated in *Johnson v. Hay,* 931 F.2d 456, 459 n.2 (8th Cir. 1991), upon the filing of a notice of appeal in an immunity case, "[j]urisdiction has been vested in the court of appeals and the district court should not act further." Thus, this Court no longer has jurisdiction over those aspects of the case involved in the President's appeal to the Eighth Circuit.[1]

The parties agree and there is no question that the Court is required to stay discovery against the President pending appeal. There is, however, a separate defendant in this case, Arkansas State Trooper Danny Ferguson, who has filed an answer to the complaint and has nothing to appeal. The President moves the Court to stay all proceedings against Ferguson as well, arguing that the issue of whether the case should go forward against Ferguson is one of the "'aspects of the case involved in the appeal.'" *Johnson v. Hay, supra.*

---

[1] The issues on appeal, as stated in the President's Certificate Regarding Transcript and Notice of Issues on Appeal, are as follows:

> 1. Whether the Constitution and principles of separation of powers require the dismissal without prejudice of this civil damages suit against an incumbent President and his co-defendant, and the tolling of any statutes of limitation applicable to the claims asserted therein, until such time as the President is no longer in office;
>
> 2. Whether the District Court's Order of December 28, 1994, erred in holding that the Supreme Court's decision in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), requires that sitting Presidents be immune only from trial, and not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the office of the President; and
>
> 3. Whether the District Court's Order of December 28, 1994, erred in refusing to stay the proceedings in their entirety until such time as the President leaves office.

See Docket Entry # 38.

Plaintiff responds that while the effect of the President's appeal is to halt proceedings related to him, there is no reason or right to stop the case as it relates to Ferguson. Plaintiff contends that just as immune and non-immune claims arising in the same lawsuit may proceed on separate tracks, so too may immune and non-immune defendants proceed separately. Plaintiff also urges that the President has two roles in this case, one as a defendant and another as a witness. Even though all proceedings against him in his role as defendant may be stayed pending appeal, Plaintiff asserts the President may still be subject to discovery on other claims as a witness.

II.

The Court rejects the President's attempt to, in effect, claim immunity on behalf of Ferguson, who has advanced no such right. The President's argument goes beyond any authority this Court has been able to find. The Court is unwilling to extend the effects of the President's immunity to Ferguson and finds that it retains jurisdiction over the case as to the Plaintiff's claims against him.

While the Court is not convinced by the President's argument that Plaintiff's claims against Ferguson are part of the aspects of the appeal, it will, nevertheless, grant President Clinton's motion to stay all proceedings in this case pending the appeal for another reason.

The Court cannot imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys. The claims are so inextricably intertwined that in order to protect the President to the full extent that his claim of immunity would provide, the Court finds that the motion should be granted. The pragmatic fact is that if discovery were allowed to proceed against Ferguson, he could only testify to action on his part, and other deponents would have to limit their testimony to Ferguson. Trooper Ferguson's testimony is among the most important in this case, but if he could not testify as to then-Governor Clinton's

instructions to him, if any, and to the Governor's involvement in this matter, if any, and to what the Governor told him, if anything, then his testimony would be a hollow shell. Trooper Ferguson is a defendant, but the case revolves around the alleged actions of then-Governor Clinton, the central figure in this action.

III.

The Court is concerned about the possibility that some discovery may be necessary to preserve documentary evidence in this case, such as business records of the Excelsior Hotel and records of state agencies. The President recognizes Plaintiff's concern that evidence may be lost, and suggests that they may be able to cooperate to obtain informal discovery or, if the need is disputed, the aggrieved party could apply to the Court of Appeals for permission to take limited discovery. (*See* Mem. Supp. Mot. to Stay at 10 n.7.) This appears to be the only solution to this potential problem. Therefore, the Court encourages the parties to cooperate to preserve specific items of evidence that may be lost due to the passage of time.

IV.

IT IS THEREFORE ORDERED that the Motion for Stay Pending Appeal is hereby granted.

DATED this 24th day of February 1995.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

United States of America, et al

Amicus Curiae

Appeal from the United States District Court
for the Eastern District of Arkansas

Decided and Filed April 17, 1995

Appellants' motion to expedite the briefing schedule and place this case on the June oral argument calendar, appellee's response in opposition and appellant's reply thereto have been referred to the Court for decision. After review, the Court hereby denies appellant's motion to expedite briefing and placement on the oral argument calendar.

This case shall proceed upon the established briefing schedule absent the filing of any parties' brief before the scheduled deadline. Counsel is reminded that any early filing will automatically advance the briefing schedule. This case shall be placed on the oral argument calendar in the ordinary course.

April 17, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

U.S. CONST. art. II, § 1, cl.1

SECTION. 1. The executive Power shall be vested in a President of the United States of America.

U.S. CONST. art. II, § 2

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. CONST. art. II, § 3

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 4

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. CONST. amend. XXV

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such

powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

42 U.S.C. § 1983 (1994)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 (1994)

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully,

and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

50 U.S.C. app. § 510 (1988)

§ 510. Purpose; suspension of enforcement of civil liabilities

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591 of this Appendix] remains in force.

50 U.S.C. app. § 521 (1988)

§ 521. Stay of proceedings where military service affects conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix] unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

50 U.S.C. app. § 525 (Supp. V 1993)

§ 525. Statutes of limitations as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

FED. R. CIV. P. 40

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

QUESTIONS PRESENTED

This case involves an uncomplicated civil action for damages against petitioner, who is currently serving as President of the United States, for acts committed by him before he became President and therefore bearing no possible relation to his official responsibilities. Petitioner sought to have the action dismissed or stayed for the duration of his service in office, but made no showing in the District Court that the lawsuit — or any particular aspect of it — would in any way impair the functioning of the presidency. The following questions are presented:

1. Whether the Court of Appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his service in office, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond "the outer perimeter of [the President's] official responsibility," the limit for presidential immunity set forth in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), and when there was no showing of any threat to the functioning of the Executive Branch.

2. Whether the Court of Appeals erred in reversing an order granting petitioner what the District Court termed a "limited or temporary immunity from trial," Pet. App. 68, for acts beyond the outer perimeter of petitioner's official responsibilities as President, when there was no showing of any threat to the functioning of the Executive Branch.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a $6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Ms. Jones (Ms. Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Ms. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite number written on it. When Ms. Jones wondered what the Governor

wanted, Trooper Ferguson responded, "It's okay, we do this all the time for the Governor." Trooper Ferguson then escorted Ms. Jones to the Governor's floor. Complaint ¶¶ 6-13.

Ms. Jones, who had never met the Governor before, entered his suite at his invitation. Small talk followed. Mr. Clinton asked Ms. Jones about her job. The Governor noted that David Harrington, an appointee of Mr. Clinton's who served as the director of Ms. Jones's agency and her superior there, was the Governor's "good friend." The Governor then made a series of verbal and physical sexual advances toward Ms. Jones, and undressed himself from the waist down. Horrified, Ms. Jones moved away from Mr. Clinton and said, "Look, I've got to go." Pulling up his pants, Mr. Clinton said, "If you get in trouble for leaving work, have Dave [Harrington] call me immediately and I'll take care of it." As Ms. Jones left, the Governor looked at her sternly and said: "You are smart. Let's keep this between ourselves." Visibly shaken and upset, Ms. Jones resumed her post downstairs. In the following hours and days, she told her coworker, friends and relatives about what had happened. Other than that, however, fearing for her job and for her relationship with her fiancé, she remained silent. She remained at her agency for the next twenty-one months, where she worked in constant fear of retaliation. She experienced what she perceived to be job retaliation for her refusal to submit to Mr. Clinton's advances. In 1993, Ms. Jones moved to California, and Mr. Clinton became President of the United States. Complaint ¶¶ 14-40, 48.

In January 1994, a widely publicized magazine article reported that, while Governor of Arkansas, Mr. Clinton regularly used members of his security detail to solicit women for sex with him. The article, which was apparently based upon the accounts of various Arkansas state troopers, reported that an unidentified trooper (clearly Mr. Ferguson) had told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and had escorted her to Mr. Clinton's room at the Excelsior Hotel. The article

reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Ms. Jones had had a sexual relationship with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Ms. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances. She also asked Mr. Clinton to acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Ms. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, Ms. Jones commenced an action against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

Mr. Ferguson answered the complaint on June 10, 1994. He admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer ¶ 11. He disclaimed having "personal knowledge of what took place in the hotel room." *Id.* ¶ 14.

For his part, Mr. Clinton did not answer the complaint, but instead requested and obtained an order allowing him to defer a response pending a motion to dismiss on grounds of "presidential immunity." Pet App. 40. On August 10, 1994, Mr. Clinton filed what was styled a "Motion to Dismiss on Grounds of Presidential Immunity." *See* Pet. App. ii. As the

District Court noted, Mr. Clinton asserted "a claim of absolute immunity": "that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office." Pet. App. 55. He principally argued that complaint should be dismissed without prejudice to being refiled after he leaves the White House; in the alternative, he argued that the District Court should stay the case until he leaves office. Pet. App. 55. Mr. Clinton's motion was predicated simply upon the fact of his occupancy of the Office of President of the United States. He made no factual showing that any aspect of the pretrial or trial proceedings would in any way hinder him from carrying out the duties of that Office.

The District Court denied the substance of Mr. Clinton's motion on December 28, 1994. Pet. App. 54. Rejecting Mr. Clinton's claim of absolute immunity, the court denied the motion to dismiss. The court observed that "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support . . . be found" for Mr. Clinton's claim that he has "immunity from civil causes of action arising prior to [his] assuming the office" of the presidency. Pet. App. 68. The court found Mr. Clinton's contention to be "contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." Pet. App. 68. Nevertheless, in a self-contradictory holding premised upon isolated language in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the District Court granted Mr. Clinton what it called a "limited or temporary immunity from trial." Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton and Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be in 1997 or 2001. Pet. App. 68-71. The

court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Ms. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the District Court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74.

On January 9, 1996, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never* been "any case in which any public official . . . has been granted any immunity from suit for his *unofficial* acts." Pet App. 7 (emphasis added). The Court of Appeals noted that, to the contrary, this Court's decision in *Nixon* v. *Fitzgerald* had recognized a presidential immunity that extended only to " 'acts within the 'outer perimeter' of [the President's] official responsibility,' " and that "unofficial acts" are "[b]y definition . . . not within the perimeter of the President's official responsibility at all, even the outer perimeter." Pet. App. 8-9 (quoting *Fitzgerald*, 457 U.S. at 756). The court concluded that *Fitzgerald*'s rationale — "that, without protection from civil liability for his *official* acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability" — is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 11 (emphasis added). The District Court's denial of Mr. Clinton's motion to dismiss was accordingly affirmed.

The Court of Appeals reversed the District Court's grant of a "limited or temporary immunity from trial" for the same reasons. While recognizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on

its docket," Pet. App. 13 (footnote omitted), the Court of Appeals held that, to the extent the District Court's grant of such an immunity could be characterized as an exercise of that discretion, the District Court's postponement of trial was an "abuse of discretion" because it was "the functional equivalent of a grant of temporary immunity to which . . . Mr. Clinton is not constitutionally entitled," *id.* at 13 n.9. The Court of Appeals stressed that the District Court had considerable power to ensure that the litigation would not interfere with Mr. Clinton's official duties, and it directed the District Court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," Pet. App. 13:

> We have every confidence that the District Court will exercise its [scheduling] discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .
>
> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .
>
> The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

In a concurring opinion, Judge Beam emphasized that Mr. Clinton had failed to point out any "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case was "not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government." Pet. App. 22. He concluded:

> Ms. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President and Ms. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of

> the litigation with maximum consideration of the President's constitutional duties. . . .
>
> As I have attempted to stress, *nothing [in our decision] prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired.*

Pet. App. 23-25 (emphasis added).

REASONS FOR DENYING THE WRIT

This one-of-a-kind case is singularly inappropriate for exercise of this Court's certiorari jurisdiction. There is no conflict among the Courts of Appeals, and so the question becomes whether Mr. Clinton has raised an important question of law that requires this Court's attention. SUP. CT. R. 10. He has not.

Mr. Clinton erroneously contends that the Court of Appeals held that "the President should receive no form of protection from . . . civil suits" for his unofficial acts. Pet. 9. The Court of Appeals stressed, however, that the district courts have ample authority — by solicitous scheduling — to ensure the unimpeded conduct of presidential business. As Judge Beam's concurrence emphasized, "nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (emphasis added).

No peril would be posed for the presidency by allowing this case to proceed. This case has nothing to do with Mr. Clinton's official duties, and, as far as federal litigation goes, it is a very simple case. Not surprisingly, Mr. Clinton made no showing that his presidential duties would be impaired by this case. He attempted no such showing because he could not make one. This case thus presents neither a legal

issue nor a factual record that would justify review by this Court.

Beyond this, Mr. Clinton's contention that, under this Court's decision in *Nixon* v. *Fitzgerald*, he is "entitled, as a matter of law, to defer this litigation," Pet. 17, is completely unfounded and unworthy of review. It is tantamount to the argument — for *official* immunity for *unofficial* acts — that was repeatedly made by Mr. Clinton and rejected below. The argument was correctly rejected: as one *amicus* explained below in refuting Mr. Clinton's immunity claim, "[u]p to this time, *no* court has *ever* held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporarily." Brief for *Amicus Curiae* American Civil Liberties Union Foundation in Support of Appellee Jones 17, *Jones* v. *Clinton*, Nos. 95-1050, 95-1167 (8th Cir. filed Apr. 28, 1995) (emphasis added). The farthest the Court has ever extended immunity is to "acts within the 'outer perimeter' of [the President's] official responsibility." *Nixon* v. *Fitzgerald*, 457 U.S. at 756. As Chief Justice Burger's concurring opinion in *Fitzgerald* explained, the President's immunity "*does not extend beyond such actions*," and "a President [is] *not immune for acts outside official duties*." *Id.* at 761 n.4, 759 (Burger, C.J., concurring) (emphasis added). The Court of Appeals simply applied what has long been understood to be the law. Its decision need not be reviewed by this Court.

Equally unworthy of review is Mr. Clinton's contention that the Court of Appeals erred in reversing the District Court's grant of an "immunity from trial." The Court of Appeals correctly found the trial judge's ruling to be an abuse of discretion because it was not an exercise of discretion; it was instead the "functional equivalent" — as the district judge herself made clear — "of a grant of temporary immunity to which . . . Mr. Clinton is not entitled." Pet. App. 13 n.9; *see id.* at 68. If analyzed as a discretionary stay of litigation, the District Court's holding manifestly failed to meet the

standards for such stays set forth by this Court in *Landis* v. *North American Co.*, 299 U.S. 248, 256 (1936): "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily upon [the] suppliant[ ] for relief" — here Mr. Clinton — and a trial court's "discretion" is "abused if [a] stay [is] not kept within the bounds of moderation." There was no showing that a stay was justified, and the District Court's issuance of a categorical stay of trial until perhaps the year 2001 was certainly immoderate. The Court of Appeals' holding on this point is unassailable, and surely does not warrant review by this Court.

I. THIS CASE DOES NOT POSE ANY CONCEIVABLE THREAT TO THE FUNCTIONING OF THE EXECUTIVE BRANCH.

This case would not work any hardship upon the presidency. It is, at bottom, a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably his counsel has already spent with him the short time required to obtain his recollection of events. By its nature, the case will not require the production of many documents. Discovery and trial in this case will not be burdensome, and can be controlled by the ample powers of the District Court to prevent any interference with official duties. Mr. Clinton has thus necessarily sought to advance his argument that this litigation might "interfere with [his] constitutionally assigned duties . . . without detailing *any* specific responsibilities or explaining how or the degree to which they are affected by the suit." Pet. App. 12 (emphasis added). He asks this Court to review his claims upon a record that is barren by his own choice. His petition can and should be denied for that reason alone.

Unable to present this Court with any factual record to support his contentions, Mr. Clinton instead asserts, as he did below, that this case will not be "an isolated one," that the courts will be "confronted with more private civil damage complaints against incumbent Presidents." Pet. 8, 21. As the Court of Appeals correctly noted, however, his assertions are "not only speculative, but historically unsupported." Pet. App. 14. In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." Pet App. 14 n.10. The historical record reveals no claims of any presidential hardship in these cases, let alone any claims of presidential immunity. Although President Kennedy, invoking his status as Commander-in-Chief, did make an unsuccessful attempt to obtain a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), *see* Pet. App. 14 n.10, that fact, like Mr. Clinton's citation of the automatic stay provision of the Bankruptcy Code, Pet. 15,[1] only illustrates that the only proper forum for the relief Mr. Clinton seeks is Congress, not the courts.

There has been no onslaught of vexatious personal litigation against the President in the two years since this case was brought, even though the case has been highly publicized. Nor is such an onslaught likely: the President's "unofficial conduct will affect only those who traffic with [him] in his personal capacity," which of course makes "the universe of potential plaintiffs . . . considerably small[ ]" indeed. Pet. App. 15. Mr. Clinton's purported fear that political partisans will make litigation their vehicle of choice is obviously unfounded. As the Nation's political history shows, litigation

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[1] The automatic stay provision merely limits the ability of a creditor to proceed against a debtor in a forum other than the bankruptcy court. The creditor is provided an opportunity to immediately assert a claim in the bankruptcy court. Therefore, the automatic-stay analogy is inept.

is hardly necessary to accuse, attack, or embarrass a public figure. Indeed, if accusations against a public figure are unjustified or purely partisan, one would think that litigation — which gives the public figure access to discovery and to a neutral forum in which to obtain vindication — is the *least* likely mode of attack. Unlike so many others who have made charges against public officials, Ms. Jones has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a court empowered not only to dismiss her claims, but to impose sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including those against Presidents.

No credible reason exists to believe that lawsuits against Presidents for unofficial conduct generally, let alone *this* lawsuit, present any problem for the practical functioning of the presidency. The lower courts have ample power to remedy any problems that might arise. That is the essence of the decision below: in rare cases such as these, trial courts can and will "exercise [their] discretion in such a way that [the] lawsuit[s] may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties." Pet. App. 13-14. The trial judge remains completely free under the Court of Appeals' decision to "halt[ ] or delay[ ] or reschedul[e]" anything in the litigation — including a trial — "at any time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (emphasis added). In the past, moreover, presidents and former Presidents have given evidence under judicial supervision even on matters that were related to their office, without any ill effect. Pet. App. 22-23.[2] Indeed, Mr. Clinton himself

[2] *See, e.g., United States* v. *Fromme*, 405 F. Supp. 578, 582-83 (E.D. Cal. 1975); *see also United States* v. *Poindexter*, 732 F. Supp. 142, 143-146, 149-160 (D.D.C. 1990); 1 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.1 (2d ed. 1992); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 278 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

recently testified at length by videotape deposition in an unrelated case in the District Court, which successfully and uncontroversially balanced the President's schedule with the rights of the litigants and the evidentiary needs of the case.[3] Mr. Clinton stated publicly that he saw nothing "inappropriate" in his being called to testify in that case, given that "Presidents since Thomas Jefferson from time to time have testified in court proceedings," and added that "[i]f . . . there's something that I know [that] can help the trial, I'll be happy to cooperate with the court."[4] And Mr. Clinton apparently either will be or has been subpoenaed to testify in yet another trial now scheduled to begin in June before the same District Judge who decided the immunity question below.[5]

Finally, Mr. Clinton offers no credible reason to believe that the exercise of judicial discretion over scheduling would give the trial judge a "general power to set priorities for the President's time and energies," or would require Mr. Clinton to seek judicial "approval to carry out [his] day-to-day responsibilities." Pet. 8, 12. The decision below neither contemplates nor compels any such judicial overreaching. To the contrary, it directs *deference* to the presidency; it mandates "judicial case management *sensitive* to the burdens of the

[3] *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark.); *see, e.g.*, Stephen Labaton, *Clinton Denies Any Link to Whitewater Case Loan*, N.Y. Times, May 10, 1996, § A, p. 1, col. 1; Alison Mitchell, *Clinton Is Ordered To Testify in Ex-Partners' Fraud Trial*, N.Y. Times, Feb. 6, 1996, § A, p. 16, col. 5; Ronald Smothers, *Judge Rules Clinton Testimony Will Be Videotaped for Trial*, N.Y. Times, Mar. 21, 1996, § A, p. 16, col. 1; Hugh Aynesworth, *Clinton Deposition Could Take 8 Hours, Judge Tells Lawyers*, Wash. Times, Apr. 18, 1996, part A, p. 18.

[4] Video Monitoring Services of America, Inc., Transcript of CNN Headline News Telecast, Feb. 7, 1996, 11:00-11:30 P.M. (EST).

[5] *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.); *see, e.g.*, Glenn R. Simpson, *Whitewater Prosecutors Wrap Up Case Against Tucker and the McDougals*, Wall St. J., May 14, 1996,

presidency and the demands of the President's schedule," Pet. App. 13 (emphasis added); it orders the trial court to *refrain* from "creating scheduling conflicts" for the President, *id.* at 14. In the highly unlikely event that a district judge fails to heed these commands, the decision below contemplates "a writ of mandamus or prohibition" from the Court of Appeals. Pet. App. 16. And if somehow, someday, *both* a trial judge and a circuit court fail to respect the duties of the presidency — an even more unlikely event — the President may seek relief from this Court. If and when that day ever comes, perhaps there would be presented a record from which this Court could find that the prerogatives of the presidency were impaired. No such record exists here.

Mr. Clinton's petition, in short, fails to raise any substantial issue as to the institutional interests of the presidency. To show anything approaching a separation-of-powers violation under this Court's cases, he must, at a minimum, specifically identify "the extent to which [the challenged law or ruling] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). He has not done that here.

II. PETITIONER IS NOT "ENTITLED, AS A MATTER OF LAW, TO DEFER THIS LITIGATION" BECAUSE THE ACTS COMPLAINED OF ARE NOT WITHIN THE OUTER PERIMETER OF HIS OFFICIAL DUTIES.

In the proceedings below, Mr. Clinton consistently styled his claim as one of "immunity." He has now dropped that word, but the relief he seeks is effectively the same.[6] For

p. A6, col. 1; Linda S. Caillouet, *President Will Receive Subpoena in Perry County Bankers' Case*, Arkansas Democrat-Gazette, May 10, 1996, p. 13A.

[6] By dropping his use of the word "immunity" to describe the relief he seeks, Mr. Clinton apparently attempts to reconcile his contentions with those of the Solicitor General, who declined below to adopt Mr. Clinton's position that the immunity case law mandated the dismissal of the suit with leave to refile after Mr. Clinton leaves office. Instead, the Solicitor General argued that "the appropriate form of relief is a stay, rather than a dismissal." Brief for the United States as *Amicus Curiae* 5, *Jones* v. *Clinton*, Nos. 95-1050, 95-1167 (8th Cir. filed Apr. 5, 1995).

Since the views of the United States were fully expressed below, there is no need for the Court to invite the Solicitor General to file a brief on Mr. Clinton's petition. For the convenience of the Court, copies of the briefs filed by the Solicitor General in the Eighth Circuit have been lodged with the Clerk of the Court.

notwithstanding his advocacy of discretionary stays, he still contends that under *Nixon* v. *Fitzgerald* he is "entitled, as a matter of law, to defer this litigation" for the remainder of his presidency. Pet. 17. That is essentially the argument for presidential immunity that was made and rejected below, and it is not only incorrect, but unprecedented. None of the prior Presidents who were sued for nonpresidential acts (Presidents Theodore Roosevelt, Harry Truman, and John Kennedy) raised this defense. Yet another President, President Nixon, *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States* v. *Nixon*, 418 U.S. 683 (1974), and then later, in his briefs in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).[7]

[7] At oral argument in *United States* v. *Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

> QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?
>
> MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument 80, *United States* v. *Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

(*footnote continued*)

The decision below merely recognized Mr. Clinton's contention for what it is: a plea for a radical, unprecedented extension of immunity to acts never before covered by immunity — acts having *nothing* to do with a public official's duties. Whether the immunity is styled "temporal" or "absolute," whether it be enforced by dismissal or by stay, there is simply no authority for the protection Mr. Clinton seeks. He remains unable to cite, and the panel members below (including the dissent) were unable to find, "*any* case in which *any* public official ever has been granted any immunity from suit for his unofficial acts." Pet. App. 7 (emphasis added). In more than a century of immunity decisions, from *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872), to *Fitzgerald*, this Court has not once suggested that a public official could avoid litigation of a case involving only unofficial acts. The Court has never extended protection for public officials, including Presidents, beyond the clear boundary set in *Fitzgerald* — "the 'outer perimeter' of [the President's] *official responsibility*." 457 U.S. at 756 (emphasis added). To the contrary, as Chief Justice Burger's concurrence in *Fitzgerald* repeatedly stressed, the Court's cases have always presumed that protection of public officials from suit covers only *official* actions and "*does not extend beyond such actions*" — that "a President, like Members of Congress, judges, prosecutors, or congressional aides . . . [is] *not* immune for acts outside official duties." *Id.* at 761 n.4, 759 (Burger, C.J., concurring) (emphasis added). It was precisely *that* limitation that allowed Chief Justice Burger to declare that *Fitzgerald* did not "place [the] President 'above the law.' " *Id.* at 759 (Burger, C.J., concurring) (citation omitted).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon 8-9 n.6, *Nixon* v. *Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

Fitzgerald surely does not, as Mr. Clinton asserts, suggest that "a sitting President may not be subjected to private civil lawsuits" relating to unofficial acts. Pet. 10. The controlling consideration in *Fitzgerald* — and, indeed, in all of this Court's immunity case law — is the fear that if the President and other officials could be sued for their official conduct, "executive officials would hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action." *Fitzgerald*, 457 U.S. at 745 (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 499 (1896)). Put simply, the Court's longstanding rationale for immunity is this:

> "*In exercising the functions of his office*, the head of an Executive Department, *keeping within the limits of his authority*, should not be under an apprehension that the motives that control his *official* conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id. (quoting *Spalding* v. *Vilas*, 161 U.S. at 498).[8] As the Court of Appeals concluded, "[i]t is clear from a careful reading of *Fitzgerald*" that this Court was "concern[ed] that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making pro-

[8] *See also, e.g.*, *Mireles* v. *Waco*, 502 U.S. 9, 10-11 (1991) (per curiam) (judges held immune for judicial acts so that they may act in official capacity without apprehension of personal liability); *Forrester* v. *White*, 484 U.S. 219, 226-29 (1988) (same); *Butz* v. *Economou*, 438 U.S. 478, 504-17 (1978) (same for executive agency officials); *Imbler* v. *Pachtman*, 424 U.S. 409, 424-431 (1976) (state prosecutors); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240-49 (1974) (state executive officials); *Tenney* v. *Brandhove*, 341 U.S. 367, 376-79 (1951) (state legislators); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347-53 (1872) (judges).

cess," and might cause the President to "make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability." Pet. App. 11. Nothing in *Fitzgerald* places a President, when acting personally, upon a pedestal above any other citizen in this democracy. To do so would contravene the Nation's egalitarian civic creed and the Constitution's guarantee of equal protection of the laws. As the Court of Appeals said below, Article II "did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society." Pet. App. 6.

The Court of Appeals thus correctly found the rationale for official immunity to be entirely "inapposite" here, "where only personal, private conduct by a President is at issue." Pet. App. 11. Imposing liability for pre-presidential or other unofficial conduct will simply not cause Presidents to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding* v. *Vilas*, 161 U.S. at 499). It will not diminish a President's " 'ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). It will not place the President " 'under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.' " *Id.* at 745 (quoting *Spalding*, 161 U.S. at 498). And it will not require any court "to probe into the elements of Presidential decisionmaking," or to engage in "judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information." *Id.* at 761-62 (Burger, C.J., concurring).

Nor did the Court of Appeals "ignore" this Court's concern in *Fitzgerald* about the potential for the "diversion of [the President's] energies by concern with private lawsuits," as

Mr. Clinton contends. Pet. 9-10 (quoting *Fitzgerald*, 457 U.S. at 751). The Court of Appeals simply reached the unassailable conclusion that this potential was far less substantial in a case having nothing to do with official conduct, and that it could be amply addressed through the sound scheduling discretion of the trial court. The court correctly concluded — given the historical experience, and the fact that the "universe of potential plaintiffs" was so small as to unofficial conduct — that the danger of distraction here is "on a different footing" than in cases (like *Fitzgerald*) that involve official acts. Pet. App. 15. Still, far from "disregard[ing] [any] 'risk[ ] to the effective functioning of government,' " Pet. 10, the Court of Appeals made clear that the institutional interests of the presidency could and would be protected:

> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, *then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities.* Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15 (emphasis added).

Finally, Mr. Clinton's contention that "deep roots in our [Nation's] traditions" (Pet. 10) support his vision of the law, is as blind as that vision itself. He cites, for example, the views of President Jefferson and others, to the effect that " 'the President, personally, was not . . . subject to any process whatsoever.' " Pet. 10 (citation omitted). Even the District Court found this view meritless; it concluded, after analyzing the historical materials, that there was "no credible support" for it. Pet. App. 68; *see* Pet. App. 56-67. It is enough to know

that President Jefferson lost the point 189 years ago. *United States* v. *Burr*, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.) ("That the president of the United States may be subpoenaed, and examined as a witness, . . . cannot be controverted."). And President Nixon lost it, too — *thrice*. *United States* v. *Nixon*, 418 U.S. 683 (1974) (ordering disclosure of official presidential communications despite claim of executive privilege); *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974) (holding President amenable to judicial process in a *civil* case); *Nixon* v. *Sirica*, 487 F.2d 700, 789 (D.C. Cir. 1973) (en banc) (per curiam) (ordering President to comply with grand jury subpoena). Mr. Clinton's attempt to rewrite the historical record should be rejected, and his petition should be denied.

III. THE COURT OF APPEALS, IN A PROPER EXERCISE OF JURISDICTION, CORRECTLY REVERSED THE DISTRICT COURT'S GRANT OF TEMPORARY IMMUNITY FROM, OR A STAY OF, TRIAL.

A. Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary *immunity* from trial." Pet. App. 68 (emphasis added); *see* Pet. 19. The Court of Appeals correctly found that what the District Court ordered — a postponement of the trial until perhaps the year *2001* — was "the functional equivalent of a grant of temporary immunity" that had no basis under the Constitution or laws of the United States. Pet. App. 13 n.9. As such, the District Court's decision was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays.

The controlling precedent is *Landis* v. *North American Co.*, 299 U.S. 248 (1936), a case Mr. Clinton misconstrues. The Court in *Landis* did indeed hold that "the power to stay proceedings is incidental to the power inherent in every court to

control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. But a stay of litigation may be granted "[o]nly in rare circumstances." *Id.* at 255. In particular, the Court held that "the suppliant for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* at 255 (emphasis added). Thus, "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the . . . suppliant[ ] for relief, and discretion [is] abused if the stay [is] not kept within the bounds of moderation." *Id.* at 256.

In reversing the District Court's postponement of trial, the Court of Appeals was faithful to *Landis*. In granting trial "immunity" to Mr. Clinton, the District Court made no finding that Mr. Clinton had made a showing of an actual and "clear case of hardship," a showing not even attempted. As Judge Beam explained, moreover, the danger of harm to Ms. Jones was manifest: she "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." Pet. App. 17. And the passage of time contemplated by the District Court's order — possibly into the next century — was surely immoderate. Indeed, in *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year." 299 U.S. at 256. Reversal of the District Court's "stay" order, if anything, was all but *required* under *Landis*. And since the "stay," despite the District Court's citation of Fed. R. Civ. P. 40 and the court's equity powers, was dependent upon its erroneous holding that Mr. Clinton was entitled to an "immunity from trial as *Fitzgerald* seems to require," Pet. App. 70, it was properly reversed for that error as well. The Court of Appeals' conclusion was thus both uniquely circumstanced

and correct, and accordingly raises no issue warranting review by this Court.

B. Mr. Clinton makes a last-ditch effort to restore the District Court's "trial immunity" order by contending that the Court of Appeals lacked jurisdiction to review it. Pet. 16-19. But he makes no effort to show why this jurisdictional issue — which understandably is not even mentioned in his list of questions presented — is worthy of certiorari review. The Eighth Circuit simply applied longstanding principles of pendent appellate jurisdiction, a concept that, as this Court has recognized, has been "endorsed" by all the federal Courts of Appeals. *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1209 n.2 (1995) (citing cases from each Circuit).[9] Mr. Clinton does not argue that, in any other Circuit, the jurisdictional ruling would have come out any other way.

Mr. Clinton is wrong in any event. He contends that the question whether he is entitled to a stay of the litigation generally is entirely "distinct" from whether he is entitled to a stay of just the trial. But as *he* presented them in the courts below, these questions were one and the same. In the Court of Appeals, *he* argued that he was entitled, *as a matter of law*, to an immunity or stay as to *all* proceedings, *including* the trial, for one reason, and one reason alone — the fact that he is President of the United States. Ms. Jones' cross-appeal argued an issue that indisputably was inextricably intertwined with Mr. Clinton's — namely, to borrow the District Court's words, whether he was entitled to "a temporary or limited immunity from trial [under] *Fitzgerald*." Pet. App. 70. The Court of Appeals reached the obvious conclusion that both appeals

[9] In *Swint*, the Court observed that it "ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." 115 S. Ct. at 1211. *Swint* thus did not impugn the viability of pendent appellate jurisdiction; it held only that "there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise" in that case. *Id.* at 1212.

> are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" that these, where answering one question of law resolves them all.

Pet. App. 5 n.4. On this point as well, the Court of Appeals was correct, and its holding raises no important question of general applicability for this Court to address.

* * *

The protections Mr. Clinton has sought in this case are unique and unprecedented; they contravene *Fitzgerald*'s explicit language; they require, contrary to *Landis*, the imposition of an insurmountable burden upon a plaintiff to prove that a President is *not* entitled to postpone a lawsuit; and they would prevent a plaintiff such as Ms. Jones from collecting her evidence before memories fade, documents are lost, and witnesses die or become incapable of testifying. In matters having nothing to do with the presidency, Mr. Clinton has sought to make a plaintiff unequal to the President in the eyes of the law. Mr. Clinton has thus demanded an immunity from suit for unofficial acts that would place him, unlike any prior President or public official, above the law. There is no support in reason, the common law, the Constitution, or in simple justice, for his demand. The Court of Appeals correctly rejected it.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

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No. 95-1853

IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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THE PETITIONER 1

REPLY BRIEF FOR THE PETITIONER

The President's submission is straightforward: No President has ever before been compelled to submit to a civil damages action, directed personally against him, during his term in office. A decision with such serious ramifications for the Presidency and the nation should not be allowed to stand without this Court first considering the President's contention, founded on both the Court's decisions and statements by the Framers, that such lawsuits must in all but the most exceptional cases be deferred until the President leaves office.

Respondent does not -- indeed, cannot -- identify a single instance in which a court has compelled an incumbent President to defend a damages action directed at him personally. Nor does respondent explain why a fragmented panel of the court of appeals, rather than this Court, should decide the extraordinarily important constitutional question of whether a President may be compelled to do so. Instead, respondent's principal contentions are (i) that this is a "one-of-a-kind case" that can be litigated without interfering with the President's conduct of his office (Br. in Op. 8); (ii) that separation of powers principles permit a trial judge to require, review -- and sometimes reject -- specific showings by the President that a matter of state is sufficiently significant to justify altering the litigation schedule (Br. in Op. 12-14); (iii) that *Nixon v. Fitzgerald*, by providing Presidents with absolute immunity from liability for conduct within the "outer perimeter" of official duties, somehow precludes deferral of this litigation (Br. in Op. 16-18); and (iv) that this nation's historic traditions pose no bar to subjecting an incumbent President to civil damages litigation (Br. in Op. 19-20). Respondent is wrong at each turn.

1. This case is evidence, if any is needed, of the wisdom of the Court's observation in *Nixon v. Fitzgerald* that "the sheer prominence of the President's office" makes him "an

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easily identifiable target for suits for civil damages." 457 U.S. 731, 752-53 (1982). Respondent's brief in opposition characterizes this lawsuit as a "very simple dispute about what happened in a very short encounter between two people in a room," and one in which "[d]iscovery and trial . . . will not be burdensome." Br. in Op. at 10. The record, however, reveals that respondent's attorneys in fact intend to use this case as a vehicle for a far-reaching inquiry:

> We'll be able to ask the President certain pertinent questions . . . . Was this a pattern of conduct that involved the use of police for private functions that would not be . . . part of their duty? Are there other women involved? Who are they? . . . [A]ll is on the table in the discovery deposition, including evidence that can lead to admissible evidence. So it's a pretty wide-ranging effort . . . .

C.A. App. 122-23 (Tr. of ABC's *Nightline* (Dec. 28, 1994)). Respondent's counsel also stated that they will "exhaustively pursue" this line of inquiry with other witnesses, and may seek to compel an unprecedented physical examination of the President. C.A. App. 117-18 (Tr. of CNN's *Daybreak* (Dec. 29, 1994)).

Respondent, in other words, envisions litigation that not only threatens the President with $700,000 in damages and seeks to impugn his reputation, but that is specifically calculated to entangle him in the "discovery deposition" process. In addition, the district court found that discovery could not be conducted on even the claims against the President's co-defendant "without the heavy involvement of the President through his attorneys." Pet. App. 76. The inevitable consequence of such purportedly "uncomplicated" litigation (Br. in Op. i) will be substantially to divert the President from his Article II responsibilities.

It takes but a single lawsuit of this kind, in *Fitzgerald's* words, to "distract a President from his public duties, to the

detriment of not only the President . . . but also the Nation that the Presidency was designed to serve." 457 U.S. at 753. That danger is especially great in the modern setting, where wide-ranging discovery is permitted and instantaneous, nationwide publicity is routinely used as a tool by litigants.

Moreover, the dangers of abuse of litigation against an incumbent President are not limited to a single case. Respondent reiterates the panel majority's conception that "the universe of potential plaintiffs" who might sue an incumbent President -- for reasons of partisanship, extortion, or publicity-seeking -- is "small[]." Br. in Op. at 11 (quoting Pet. App. 15). But no person becomes President without having been highly prominent for an extended period in the public or private sector. If the Court allows this case to proceed, it is difficult to believe that other potential litigants, encouraged by the spectacle, will not come forward in this or future Administrations, to use a lawsuit to distract, harass or obtain personal information about a President by "alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of pretrial motion." Pet. App. 27 (Ross, J. dissenting).

Respondent asserts that there is no extensive history of litigation against a sitting President being used for this purpose. Br. in Op. at 11. But there was no history of Presidents being sued for official acts before *Nixon v. Fitzgerald*. *See* 457 U.S. at 753 n.33.[1] The Court nonetheless granted certiorari in *Fitzgerald*, and afforded President Nixon an absolute immunity -- a much broader protection than is sought here --

---

[1] The Court in *Fitzgerald* attributed this to the fact that *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which permitted damages actions against federal officials for violations of the Constitution, was of relatively recent vintage. But common law tort actions had long been available against federal officials, as Justice Harlan noted in *Bivens*. *See* 403 U.S. at 400 n.3, 409 (Harlan, J. concurring). The more likely explanation for the absence of suits against the President is that -- as we showed in the petition -- it was universally understood that the President could not be sued for damages while in office. *See Fitzgerald*, 457 U.S. at 758.

because it recognized the danger that opportunistic litigation presents to the office of the Presidency. 457 U.S. at 753. The risk of opportunistic litigation is no less in a case of this kind than it was in *Fitzgerald*, and this Court's review is no less warranted here.

2.a. Respondent embraces the panel majority's view that the risk such litigation poses to the Presidency can be managed by allowing trial judges to exercise discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it will precipitate repeated confrontations between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation schedule be modified because of the demands of his office. As Judge Ross asked below (Pet. App. 29):

> Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? . . . [C]an a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict?

The brief in opposition seeks to create the impression that trial judges will be highly deferential to the demands of the Presidency. It repeatedly quotes Judge Beam's formulation, according to which a trial judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25, *quoted in* Br. in Op. 8, 12. But that is not the standard established by the prevailing opinion below, which stated that the President could obtain relief from a trial judge

only if he could show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16.

Moreover, under either standard, once trial judges are vested with discretion, they inevitably will exercise it in different -- and sometimes highly intrusive -- ways. While some may be deferential to the President, others surely will not be. And the affront to the separation of powers inheres in the very fact that a trial judge is empowered to review the President's official responsibilities to determine whether he should instead devote his attention to a private civil action.

One need look no further than this case to see the pitfalls in authorizing courts to review such matters. Here, the district court made a specific case-management determination, based on the particular facts of this case, that the trial should be stayed until the President leaves office. Pet. App. 70-71. The panel majority, notwithstanding its purported reliance on the discretion of trial judges, promptly reversed the stay as an abuse of discretion, without even explaining why the district court's evaluation of the facts was mistaken. Pet. App. 13 n.9.

This clash between the district court and the court of appeals -- and the disagreement within the court of appeals even as to the appropriate legal standard -- is symptomatic. It shows that the separation of powers cannot reliably be protected by requiring the President to make ad hoc showings about how specific aspects of the litigation will affect his ability to carry out his official duties. It also underscores the need for this Court to review this important issue.

b. In arguing that courts can oversee Presidential involvement in civil damages litigation, respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. Br. in Op. 12-13. The lesson of those cases, however, is the opposite of what respondent suggests: they

show how difficult it is for courts to reconcile the demands of the judicial process with the responsibilities of the executive branch.

A President who testifies as a witness is involved in a one-time encounter with the judiciary. By contrast, a defendant faced with personal liability will be involved in every phase of the litigation. The opportunities for tension and conflict between the President and the courts thus increase exponentially. Moreover, a President who is a third-party witness ordinarily faces little risk to his reputation or financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. The burdens and distractions that ensue inevitably will be far more intrusive than when the President is a witness.

Nonetheless, even in the far less burdensome context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking[2] and should be undertaken only in cases of compelling need.[3] Even when

[2] *See, e.g., United States v. Poindexter*, 732 F. Supp. 142, 148-50, 155-59 (D.D.C. 1990) (court limited defendant to written interrogatories and videotaped deposition, and reviewed questions to be asked in advance); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (permitting presidential testimony only by way of videotaped deposition conducted at the White House, supervised by the trial court via videoconferencing to avoid abuses, after which only directly relevant portions would be shown at trial).

[3] *See, e.g., Poindexter*, 732 F. Supp. at 147 (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (footnote omitted); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (compelled testimony of former President in a criminal proceeding must be justified by a "sufficient showing . . . that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

the President is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests -- giving a trial court the power to manage the President's priorities to accommodate personal damages litigation -- pushes the separation of powers past the breaking point.

Finally, even in cases where only testimony or evidence has been sought from a President, this Court repeatedly has drawn a clear line between criminal proceedings -- where a compelling public interest is involved -- and civil damages proceedings. *See Nixon v. Fitzgerald*, 457 U.S. at 754 & n.37; *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974). The fact that Presidents on occasion appear as witnesses in criminal proceedings, therefore, does not support the conclusion that a President is required to participate in a private civil damages action in any capacity -- and certainly not as a defendant.

3.a. The brief in opposition attempts to create the impression that the President seeks to be held absolutely immune from liability for actions he took while he was not President. The President seeks no such thing, and respondent's elaborate arguments against that proposition (Br. in Op. i, 9, 15-18, 20-22) are simply a determined effort to confuse the issue. Rather, throughout this case, the President has asserted that the responsibilities of the Presidency warrant a stay of litigation until he leaves office. He does not seek to extinguish the respondent's rights to pursue her claims, does not seek to evade accountability, and remains subject to the risk of damages.

And while respondent, like the panel majority, engages in overblown rhetoric to the effect that the President is seeking to place himself "above the law" and that the relief he seeks is "unprecedented," even respondent is forced to concede the validity of the underlying principle for which we contend. She acknowledges that the President is not like any other litigant, and that the courts must show "deference" and

must accommodate the President's unique responsibilities. Br. in Op. 12-14.

b. Respondent and the panel majority suggest that *Fitzgerald* affirmatively rejected the President's position here. Pet. App. 8-9, 10-11; Br. in Op. at 16, 23. This suggestion is, to say the least, odd: in *Fitzgerald*, even the plaintiff, although seeking to hold then-former President Nixon liable in damages, conceded in his brief that litigation against a sitting President could be stayed[4] -- reflecting the universal understanding, until this case, that a President cannot be subjected to personal damages litigation during his term of office. The issue in *Fitzgerald* was whether a President enjoys absolute immunity from liability for all his official acts. The Court decided that the President, alone among all public officials, is entitled to this exceptional protection. That conclusion is fully consistent with our view that a President who is sued for acts outside the scope of his office is entitled to the much more limited relief of temporary insulation from litigation. Indeed, as we showed in the petition, a crucial aspect of the Court's reasoning in *Fitzgerald* was that personal damages litigation can divert a President from his official duties.[5]

Respondent (Br. in Op. 9, 16) makes much of Chief Justice Burger's statement in *Fitzgerald* that "[t]he doctrine of absolute immunity does not extend beyond [official] actions," -- a statement with which we of course agree. 457 U.S. at 761 n.4. (Burger, C.J., concurring); *see also id.* at 759. Respondent does not mention that Chief Justice Burger also said

[4] Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1783 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

[5] The respondent suggests that the President is entitled to the relief sought here only if provided for in an act of Congress. Br. in Op. 11. We disagree. The relief sought here is required by the singular nature of the President's constitutional duties, and by principles of separation of powers. *Fitzgerald*, 457 U.S. at 749. The President does not rely on, or claim any relief under, the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. app. §§ 501-525 (1988 & Supp. V 1993)), or any other legislation.

that "[t]he need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties," and cautioned that "litigation processes . . . can be and are used as mechanisms of extortion." *Id.* at 763.

4. Respondent asserts (Br. in Op. 19-20) that President Jefferson "lost" his argument that subjecting Presidents to a Court's jurisdiction undermines the separation of powers. In fact, our history -- beginning at least with President Jefferson and extending through the *Burr* cases, the *Fitzgerald* case, and *United States v. Nixon* and its progeny -- teaches that subjecting a sitting President personally to the process of the courts is something that should be done only in cases of imperative need, and then only to the most limited extent possible. *See Fitzgerald*, 457 U.S. at 753-54.[6]

[6] In the face of this Court's demonstration in *Fitzgerald* that the Framers contemplated that Presidents would not be subject to suit while in office (457 U.S. at 751 n.31), respondent cites four cases. Br. in Op. 20. Three involve the entirely different question of whether a President can be required to be a witness in a criminal proceeding. *See supra*, p. 6-7. The fourth, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1973) (en banc) ("*NTEU*"), is inapposite and of questionable vitality, and in any event supports our position. In *NTEU*, the President was sued for injunctive relief in his official capacity, and was not required to defend the litigation personally. The court of appeals stated that it had the authority to mandamus President Nixon to perform a ministerial duty, but refrained from exercising that authority "in order to show the utmost respect to the office . . . and to avoid, if at all possible . . . any clash between the judicial and executive branches." The court proceeded by way of declaratory judgment instead. 492 F.2d at 616. Contrary to respondent's suggestion, *NTEU* demonstrates that courts go to great lengths to avoid entangling the President in their jurisdiction. Moreover, even the viability of the opinion expressed in *NTEU* -- that a President could be enjoined -- is in doubt, in view of the more recent discussion of that issue in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *See id.*, 505 U.S. at 802-03 (plurality opinion of O'Connor, J.) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-99 (1867)); *id.* at 826 (Scalia, J., concurring).

No court has ever, until now, required a sitting President to defend a civil damages action directed at him personally. In fact, no court has ever required a President to testify in a civil case as a witness. What respondent seeks -- allowing a sitting President to be sued for damages in his personal capacity -- would be an intrusion far beyond anything that has ever before been allowed, or even contemplated. To permit such an intrusion, without even so much as this Court's review, is utterly unwarranted.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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No. 95-1853

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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2588

QUESTION PRESENTED

Whether a private civil action for damages against the President of the United States, based on alleged pre-Presidential conduct, should be permitted to go forward during the President's term of office.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

This is a private civil action for damages against the President of the United States based on alleged pre-Presidential conduct. The decision below compels the President to participate in discovery and defend himself at trial. The United States has a fundamental interest in protecting the Office of the President and the powers and duties vested in that Office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what

circumstances, a sitting President may be compelled to take part in judicial proceedings.[1]

STATEMENT

1. In May 1994, respondent Paula Corbin Jones filed a complaint in the United States District Court for the Eastern District of Arkansas. The complaint named as defendants petitioner William Jefferson Clinton, the President of the United States and former Governor of Arkansas, and Danny Ferguson, an Arkansas state trooper. Respondent alleged that then-Governor Clinton had sexually harassed her in May 1991, and that she was thereafter subjected to retaliation and libel relating to the episode. Respondent asserted claims under 42 U.S.C. 1983 and 1985, and under the common law of Arkansas. She

[1] The United States has participated in other cases that have presented related issues of Presidential participation in judicial proceedings. The United States participated as amicus curiae in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which involved the President's immunity from civil actions for damages based on the President's conduct in office. Similarly, in *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.), which involved the amenability of a sitting Vice President to a criminal indictment and trial, the United States also addressed the amenability of a sitting President to prosecution. In addition, the United States participated as amicus curiae in *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990), regarding the amenability of former President Reagan to a criminal subpoena relating to the Iran-Contra affair, and in *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996), regarding the subpoena issued to President Clinton. The United States has participated as well in federal and state courts in cases involving the immunity of foreign heads of state. See, *e.g.*, *LaFontant* v. *Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Anonymous* v. *Anonymous*, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

sought $75,000 in compensatory damages and $100,000 in punitive damages for each claim.

In August 1994, the President filed a motion to dismiss the suit without prejudice or, in the alternative, to stay the suit. The President contended that he was immune during his term of office from private civil litigation arising out of pre-Presidential conduct. The President asserted that respondent should not be allowed to proceed with her suit while he remained in office, but should be permitted to reinstate her suit thereafter.[2]

The United States filed a statement of interest pursuant to 28 U.S.C. 517. The United States argued that, except in unusual circumstances, the President should not be compelled to defend himself during his term of office against private suits based on pre-Presidential conduct. The United States further submitted that this case presents no unusual circumstances that would warrant allowing the litigation to proceed during the President's term. The United States recommended that the court stay the proceedings, rather than dismiss the suit, in order to avoid any possible statute of limitations problems.

In December 1994, the district court entered an order denying the President's motion to dismiss but partially granting the President's alternative motion for a stay. Pet. App. 54-77. The district court sought guidance from *Nixon* v. *Fitzgerald*, 457 U.S. 731

[2] A separate immunity issue exists with respect to one of respondent Jones's claims, a libel claim that concerns alleged statements made on the President's behalf after he took office. See Pet. App. 9 n.7. Neither the district court nor the court of appeals has addressed whether the statements at issue come within the scope of the President's immunity under *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

(1982), in which this Court recognized absolute Presidential immunity for acts "within the 'outer perimeter' of [the President's] official responsibility." *Id.* at 756. Relying on the Court's reasoning in *Fitzgerald*, the district court concluded that the President is entitled to "temporary or limited immunity from trial" during his term of office for claims based on his unofficial acts. Pet. App. 70. The district court also based the stay on its equitable power over its docket and on Rule 40 of the Federal Rules of Civil Procedure. *Id.* at 71. The court held, however, that discovery could proceed "as to all persons including the President himself." *Ibid.*

2. The President and respondent filed cross-appeals from the district court's order. On January 9, 1996, a divided panel of the Eighth Circuit affirmed the denial of the President's motion to dismiss, reversed the grant of a partial stay, and remanded with instructions to allow the suit to proceed. Pet. App. 1-31.

The majority framed the issue as whether the President "is entitled to immunity from civil liability for his unofficial acts." Pet. App. 3. The court held that the President "is entitled to immunity, if at all, only because the Constitution ordains it." *Id.* at 16. The majority then determined that the Constitution does not grant the President immunity from private suits based on the President's unofficial acts. *Ibid.* It reasoned that the President's immunity under *Fitzgerald* for acts within the "outer perimeter" of his official duties represents the full extent of Presidential immunity under the Constitution. *Id.* at 8-9. The court acknowledged that the district court had also predicated its stay on its "broad discretion in matters concerning its own docket," but held that it

was an abuse of discretion for the district court to grant the stay in the absence of a constitutionally mandated immunity. *Id.* at 13 n.9. Judge Ross dissented, taking the position that private actions for damages against a sitting President based on the President's unofficial acts should be stayed until the completion of the President's term "unless exigent circumstances can be shown." *Id.* at 25.

ARGUMENT

The decision below prohibits trial courts from staying private civil suits against the President of the United States during the President's term of office. In the view of the United States, that decision is fundamentally mistaken. When a private litigant invokes judicial processes to pursue claims against a sitting President, the court ordinarily should exercise its power to postpone the litigation until the President leaves office. By compelling Presidents to defend themselves against personal liability during their term of office, the Eighth Circuit's holding creates serious risks for the institution of the Presidency. Given the practical importance of this issue to the responsibilities of the Presidency, and given the shortcomings in the Eighth Circuit's reasoning, review by this Court is warranted.

1. a. At issue here is when, not whether, the President may be required to defend himself against claims based on his unofficial acts. Resolution of that issue implicates the basic and well-established judicial power to stay civil proceedings. Over a half-century ago, in *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936), this Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the

causes on its docket with economy of time and effort for itself, for counsel, and for litigants." The Court recognized in *Landis* that "[o]ccasions may arise when it would be 'a scandal to the administration of justice' * * * if power to coordinate the business of the court efficiently and sensibly [by staying proceedings] were lacking altogether." *Id.* at 255. In the view of the United States, the established authority of trial courts to stay proceedings should be exercised, except in extraordinary circumstances, to defer private suits against a sitting President during his term of office.

Whenever a litigant seeks to invoke the processes of the courts against the President, "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753. To be sure, the separation-of-powers doctrine "does not bar every exercise of jurisdiction over the President of the United States. But * * * a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 753-754. When the President is forced to defend himself in his personal capacity during his term of office, "the dangers of intrusion on the authority and functions of the Executive Branch" are both real and obvious. The substantial burdens borne by individual defendants in civil litigation, especially litigation seeking to impose personal financial liability, require little elaboration. When those burdens are imposed on the President of the United States, they can be expected to impinge on the President's discharge of his constitutional duties, by forcing him to divert his energy and attention to the task of

protecting himself against personal liability. As a result, they implicate interests that are both public and constitutional in nature.

As this Court noted in *Fitzgerald*, "[t]he President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." 457 U.S. at 749, 750. The President is the sole repository of the "executive Power" created by Article II of the Constitution. *Id.* at 749-750. Under Article II, the President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "the enforcement of federal law * * *; the conduct of foreign affairs * * *; and the management of the Executive Branch." *Id.* at 750.

Both constitutionally and practically speaking, the demands of the President's office are unceasing. See Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 713 (1995). The President must attend to his constitutional duties continuously throughout his tenure, in contrast to the Congress, which is required to assemble only "once in every Year," U.S. Const. Art. I, § 4, and which may adjourn on a regular basis, U.S. Const. Art. I, § 5. As a practical matter, the issues of domestic and foreign policy that call for the President's attention fully occupy, if they do not indeed outstrip, the time available for the President to respond. The adoption of the Twenty-Fifth Amendment, with its elaborate machinery for carrying out the President's functions when he "is unable to discharge the powers and duties of his office," testifies to the unique nature of the

Presidency and the incessant demands on its occupants.

Accordingly, a sitting President can defend himself against an action for damages, and assume all of the burdens that such an undertaking entails, only by diverting his time and attention from the demands of his office. That result would disserve the substantial public interest in the President's unhindered execution of his duties. It would also impair the integrity of the role assigned to the President by Article II of the Constitution.

On several occasions, sitting Presidents have given testimony as witnesses in federal criminal cases by means of depositions and interrogatories, while declining to attend, or being excused from attending, court to testify in person. See generally Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote*, 1975 U. Ill. L. F. 1; *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (order providing for President's videotaped deposition testimony in Whitewater prosecution). We know of no instance, however, in which a sitting President has been compelled to furnish evidence in connection with a civil proceeding. In any event, the burdens of participating in a civil suit as a defendant are far different, both in degree and in kind, from the burdens imposed on a witness, and the risk of wrongfully motivated efforts to entangle the President in those burdens is far greater. As a result, the historical examples of sitting Presidents' giving evidence as witnesses in criminal cases do not suggest that the President may

appropriately be forced to defend himself against personal liability during his term of office.[3]

b. This Court's decision in *Fitzgerald* casts light on the constitutional implications of subjecting the President to the burdens of civil litigation. As noted above, the Court held in *Fitzgerald* that the President is entitled to absolute immunity from claims for damages "for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. The Court characterized that immunity from liability as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.[4]

In according the President absolute immunity, the Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were

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[3] The production of evidence at a criminal trial has constitutional dimensions, since the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." See *United States* v. *Nixon*, 418 U.S. 683, 711 (1974). A plaintiff in a civil action can assert no comparable constitutional entitlement. Cf. *Fitzgerald*, 457 U.S. at 754 n.37 ("there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions").

[4] The Court in *Fitzgerald* discussed in some detail historical precedents regarding the susceptibility of sitting Presidents to judicial process. See 457 U.S. at 751-752 n.31. The Court noted, *inter alia*, that such early Americans as John Adams, Oliver Ellsworth, Joseph Story, and Thomas Jefferson believed the President not to be subject to judicial process. *Id.* at 751 n.31. The Court concluded that "[t]he best historical evidence clearly supports" a rule of absolute immunity for a President's official actions. *Id.* at 752 n.31.

subject to suits for damages based on his official conduct. 457 U.S. at 751-754. To expose the President to suits for damages based on his official actions, the Court reasoned, could deprive him of "the maximum ability to deal fearlessly and impartially with the duties of his office." *Id.* at 752 (internal quotation marks omitted). The Court observed that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. In his concurring opinion, Chief Justice Burger also noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763 (Burger, C.J., concurring).

When the President is sued for actions wholly unrelated to his official responsibilities, *Fitzgerald*'s concern for ensuring "fearless[] and impartial[]" Presidential decisionmaking is not directly implicated. The more general concerns underlying this Court's holding, however, apply with equal force. *Fitzgerald* recognizes that "[t]he President occupies a unique position in the constitutional scheme," 457 U.S. at 749; that the President should not be diverted from attending to the national welfare by "concern with private lawsuits," *id.* at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs, *id.* at 754 n.37. As explained above, the President would be faced with a "diversion of his energies by concern with private lawsuits," *id.* at 751, if he were compelled to defend himself against a private damage action during his term in office. That

diversion would "raise unique risks to the effective functioning of government." *Ibid.* *Fitzgerald* indicates that the judicial system should not lend itself to such risks.

c. When a sitting President is sued for conduct unrelated to his official actions, the demands of the Presidency do not require absolute immunity from liability. Rather, those demands may be accommodated by the more limited alternative of postponing the litigation until the President leaves office. Deferring litigation until the expiration of the President's term is sufficient to forestall the "intrusion on the authority and functions of the Executive Branch," *Fitzgerald*, 457 U.S. at 754, that would result if the President were required to divert his attention to the task of defending himself against personal liability. At the same time, deferring the suit preserves the plaintiff's right to seek relief for a meritorious claim. It affects only when, not whether, the President must answer the allegations; it merely delays, rather than defeats, the vindication of the plaintiff's private legal interests. It is thus far less burdensome for plaintiffs than the immunity recognized in *Fitzgerald*.[5]

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[5] Somewhat different concerns might be raised by private actions for equitable relief, such as suits to enjoin ongoing unlawful conduct unrelated to the President's official duties. But when a plaintiff seeks only damages for alleged past misconduct, delay is unlikely to vitiate the relief. And there is no reason to expect, at least as a general matter, that postponing litigation will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims. If the circumstances of a particular case suggest an unusual risk that specific evidence will be lost—for example, if the case will require the testimony of an extremely ill witness—arrange-

The rule we suggest is not an absolute one. In the exceptional case where a plaintiff will suffer irreparable injury without immediate relief, and where prompt adjudication will not significantly impair the President's ability to attend to the duties of his office, a stay need not issue. Absent such a showing, however, the public and constitutional interests in the President's undivided attention to his office demand a stay.[6]

d. The circumstances of this case do not support a departure from the general rule outlined above. To the contrary, this case well illustrates the potential burdens that private litigation would impose on the President's discharge of his official duties.

The President is the principal defendant in this case, and the suit seeks to subject him to hundreds of thousands of dollars in personal liability. Respondent's claims focus overwhelmingly on his alleged

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ments can be made to preserve that evidence without allowing a more general commencement or resumption of the litigation. Cf. Fed. R. Civ. P. 27 (perpetuation of testimony). Postponing adjudication of private damage actions will therefore rarely defeat a plaintiff's ability ultimately to obtain meaningful relief.

[6] Where the public and constitutional interest in the President's unimpaired attention to his duties conflicts with the purely private interest of a plaintiff in obtaining immediate relief, the private interest must yield. Cf. *Fitzgerald*, 457 U.S. at 754 n.37 (President has absolute immunity for claims relating to official actions even though "absolute immunity may impose a regrettable cost on individuals whose rights have been violated"). As a result, even where a plaintiff can show that his or her interests would be prejudiced, a stay should issue unless the court further determines that allowing the litigation to proceed would not impair the President's attention to the demands of his office.

actions, and her complaint acknowledges that the facts surrounding those claims are hotly contested. The President's testimony presumably would be central to the resolution of the underlying factual controversy. The case therefore threatens to place highly burdensome demands on his time and energy. If the President were required to defend himself against respondent's claims during his term of office, he would necessarily be forced to divert his attention from the demands of the Presidency.

In contrast, immediate resolution of respondent's claims is unnecessary to protect her interests. The complaint does not disclose any need for immediate relief. Respondent seeks damages for past actions, not relief against ongoing or future harms. Delaying an award of damages until after the President's term of office (if any award were determined to be due) would not appreciably affect the value of that relief. Moreover, as the district court pointed out, respondent waited three years from the time of the President's alleged actions before filing suit. There accordingly is no reason to believe that time is now of the essence. Nor is there any reason to believe that a stay will jeopardize respondent's ability to marshal evidence on her behalf.[7] In sum, the specific circumstances of this case reinforce the general rationale for postponing civil suits against sitting Presidents.

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[7] Respondent characterizes this case as "a very simple dispute," involving "only a handful of potentially important witnesses." Br. in Opp. 10. Given the nature of respondent's claims, the principal witnesses presumably are President Clinton and respondent herself. There is no reason to expect that either party will be unable to give testimony after the President leaves office.

2. The Eighth Circuit rejected this analysis, holding instead that the district court had committed reversible error in granting the President even a partial stay of proceedings during his term of office. The Eighth Circuit's reasoning is seriously flawed.

a. The court of appeals concluded that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. That conclusion rests on a reading of constitutional history and precedent that is, at best, highly debatable with respect to the conduct of litigation against the President during his term of office. In particular, the Eighth Circuit failed to give sufficient weight to the constitutional concerns identified by this Court in *Fitzgerald*. See pages 9-11, *supra*; see also Pet. App. 25-31 (Ross, J., dissenting).

In any event, even if the Eighth Circuit were correct that the Constitution *ex proprio vigore* does not render the President "immune" from civil actions during his term of office, that conclusion would not resolve the case. The question remains whether the constitutional and practical demands of the Presidency should lead a court to postpone such litigation until the President leaves office. The court of appeals acknowledged that a trial court has "broad discretion in matters concerning its own docket," but nonetheless held that the district court had committed reversible error by exercising that discretion in favor of a partial stay. Pet. App. 13 n.9. The court reasoned that a sitting President is entitled to immunity from civil suits, "if at all, only because the Constitution ordains it." *Id.* at 16. Because it believed that the President is not "constitutionally entitled" to "temporary immunity," the court of appeals concluded that

it was an abuse of discretion for the district court to grant a stay on equitable grounds. *Id.* at 13 n.9.

That line of reasoning is fundamentally misconceived. To begin with, official immunity is not confined, as the Eighth Circuit thought, to cases in which "the Constitution ordains it." See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 497 (1978) ("the doctrine of official immunity from § 1983 liability * * * [is] *not* constitutionally grounded") (emphasis added); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Fitzgerald*, 457 U.S. at 747 ("Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history," and "[t]his Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government."). *A fortiori*, no constitutional mandate is required for the more limited kind of "immunity" at issue in this case, which defers rather than denies the plaintiff's opportunity to pursue her claims in court. A court enjoys inherent authority to control the progress of cases on its docket, and it properly may exercise that authority to accommodate public and private interests that would be unfairly prejudiced by immediate litigation, regardless of whether it is constitutionally required to do so.

b. The court of appeals concluded that sitting Presidents can be shielded adequately from the burdens of civil litigation, without a stay, through "judicial case management." Pet. App. 13. That conclusion is, in our view, unduly optimistic. As a defendant, the President has a direct financial stake in the outcome of the litigation and an obligation to marshal his defenses. If the litigation is allowed to proceed during his term of office, the President will

inevitably be required to devote significant energy, expense, and attention to it, even if the court regulates the timing and extent of discovery and Presidential testimony. The Eighth Circuit's own conception of the future district court proceedings, in which the President must resort to repeated "motions for rescheduling, additional time, or continuances," *id.* at 16, belies the notion that "case management" can meaningfully protect the President from the need to attend to the litigation.

c. The Eighth Circuit's decision is also problematic in its analysis of the other interests involved. The majority and concurring opinions suggest that delaying litigation until a sitting President leaves office would infringe on a constitutional right of the plaintiff to have access to the courts. Pet. App. 10, 17, 20-21. The causes of action asserted here, however, are based on statutes (42 U.S.C. 1983 and 1985) or state common law, and therefore may be subjected to limitations and procedures designed to protect countervailing public interests. Moreover, a stay affects only the timing of the litigation, not whether the plaintiff receives her day in court. As a result, the plaintiff's asserted constitutional interest is preserved. In this regard, we note that while the Bill of Rights guarantees the right to a speedy trial in criminal cases (U.S. Const. Amend. VI), it lacks a similar guarantee for civil litigation.[8]

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[8] The concurring opinion is similarly mistaken in suggesting (Pet. App. 17) that a stay of the litigation would infringe on the plaintiff's Seventh Amendment right to trial by jury. The Seventh Amendment concerns who will decide contested issues of fact, not when such issues will be decided. See *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 23 (1899) (Seventh Amendment

d. The court of appeals' decision is sharply at odds with the surrounding legal landscape. For example, the available evidence indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting President.[9] The court of appeals' decision thus gives greater priority to private civil actions than criminal law enforcement proceedings would receive. Yet as this Court noted in *Fitzgerald*, "there is a lesser public interest in actions for civil damages than * * * in criminal prosecutions." 457 U.S. at 754 n.37.

In other contexts as well, it has been recognized that the public interest may require a stay of civil litigation. For example, a postponement or stay may be appropriate during the pendency of administrative proceedings (see, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 765 n.13 (1979); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306-307 (1973)), criminal proceedings (see, *e.g.*, 21 U.S.C. 881(i); *Koester* v. *American Republic Invs.*, 11 F.3d 818, 823 (8th Cir. 1993); *United States* v. *Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976); 2 B. Beale & S. Bryson, *Grand Jury Law and Practice* § 8:07 (1986)),

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"does not prescribe at what stage of an action a trial by jury must * * * be had").

[9] See, *e.g.*, 2 Max Farrand, *Records of the Federal Convention of 1787* 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (Hamilton) (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law"). In *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.), the United States took the posi-tion that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

arbitration proceedings (*Moses H. Cone Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983)), bankruptcy proceedings (11 U.S.C. 362; *Hill* v. *Harding*, 107 U.S. 631, 634 (1882); cf. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989) (FSLIC receivership)), or state court proceedings (*Heck* v. *Humphrey*, 114 S. Ct. 2364, 2373 n.8 (1994); *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 83 (1975); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964)). Similarly, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 501 *et seq.*, provides for federal and state courts to grant stays in suits involving persons in military service in specified circumstances, 50 U.S.C. App. 521. See, *e.g.*, *Semler* v. *Oertwig*, 12 N.W.2d 265, 270 (Iowa 1943); *Coburn* v. *Coburn*, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982).[10] The postponement of litigation under any of these doctrines or statutory schemes may be lengthy, sometimes as long or longer than a President's term in office. Congress and the courts have thought this result justified, however, because of the weight of the countervailing public policies supporting a stay.

The constitutional demands of the Office of President require the full measure of the President's attention and energy so long as he serves. We submit that the need to avoid substantial distractions from the President's constitutional duties is compelling, and is clearly of sufficient magnitude to require a

[10] Although we understand that the President does not claim relief under this statute, see Reply Br. 8 n.5, it demonstrates—like the other examples cited in text—that reasons of public policy may in certain circumstances require postponement of civil litigation.

stay of civil litigation against the President, absent unusual circumstances not present here. Due regard for the institution of the Presidency under our constitutional structure calls for the Court to resolve this issue now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Certiorari Granted June 24, 1996

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PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

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July 21, 1994	RESPONSE BRIEF by plaintiff Paula Corbin Jones to Mr. Clinton's reply to plaintiff's opposition to defendant's motion to set briefing schedule [9-1] (vjt)
July 21, 1994	MEMORANDUM AND ORDER by Judge Susan W. Wright granting the President permission to file a motion to dismiss on the grounds of presidential immunity on or before August 10, 1994, and to defer and preserve the filing of any other motions or pleadings that may or must be filed under the Federal Rules of Civil Procedure until such time as the issue of presidential immunity has been resolved by this Court (this order only addresses the procedural issue, not the substantive questions relating to immunity) [9-1] (cc: all counsel) EOD July 21, 1994 (vjt) [Edit date July 21, 1994]
August 10, 1994	MOTION by defendant William Jefferson Clinton to dismiss on grounds of presidential immunity (vjt)
August 10, 1994	MEMORANDUM by defendant William Jefferson Clinton in support of motion to dismiss on grounds of presidential immunity [17-1] (vjt)
August 10, 1994	ATTACHMENTS to memorandum in support of President Clinton's motion to dismiss [18-1] (vjt)
August 12, 1994	MOTION by plaintiff Paula Corbin Jones to extend time for responding to defendant's motion to dismiss on

	grounds of presidential immunity (jad) [Entry date August 15, 1994]
August 12, 1994	ORDER by Judge Susan W. Wright granting motion to extend time for responding to defendant's motion to dismiss on grounds of presidential immunity [20-1] [17-1] (cc: all counsel) (jad) [Entry date August 15, 1994]
August 19, 1994	STATEMENT of Interest of the United States (vjt)
October 21, 1994	RESPONSE by plaintiff Paula Corbin Jones to President Clinton's motion to dismiss on grounds of presidential immunity [17-1] (vjt)
October 21, 1994	MEMORANDUM by plaintiff in support of motion response [23-1] (vjt)
October 27, 1994	ORDER by Judge Susan W. Wright that amicus briefs are not to be filed with the Court, and if submitted, will be made a part of the correspondence file (cc: all counsel) EOD October 27, 1994 (vjt)
October 27, 1994	MOTION by defendant President Clinton for leave to file reply (vjt)
October 27, 1994	ORDER by Judge Susan W. Wright denying President Clinton's motion for leave to file reply brief [26-1] (cc: all counsel) (vjt) [Entry date October 28, 1994]
November 1, 1994	MOTION by defendant President Clinton for oral argument on his motion to dismiss on grounds of presidential immunity (vjt)

November 3, 1994	MOTION by plaintiff to permit filing of affidavit of Paula Corbin Jones under seal (vjt)
November 3, 1994	MEMORANDUM in Opposition by defendant President Clinton to plaintiff's motion to permit filing of affidavit of Paula Corbin Jones under seal [29-1] (vjt) [Entry date November 4, 1994]
November 14, 1994	REPLY by plaintiff to President Clinton's response to motion to permit filing of affidavit of Paula Corbin Jones under seal [29-1] (vjt) [Entry date November 15, 1994]
November 14, 1994	RESPONSE by plaintiff to President Clinton's motion for oral argument [28-1] (vjt) [Entry date November 15, 1994]
November 23, 1994	ORDER by Judge Susan W. Wright denying plaintiff's motion to permit filing of affidavit of Paula Corbin Jones under seal [29-1]; denying President Clinton's motion for oral argument re: motion to dismiss on grounds of presidential immunity [28-1] (cc: all counsel) EOD November 23, 1994 (vjt)
December 28, 1994	MEMORANDUM OPINION AND ORDER by Judge Susan W. Wright denying President Clinton's motion to dismiss on grounds of presidential immunity; the court will issue a scheduling order in due course [17-1] (cc: all counsel) EOD December 28, 1994 (vjt)

December 30, 1994	NOTICE of appeal by defendant William Jefferson Clinton from District Court decision [34-1] (appeal fees paid) (Two certified copies to Clerk of the United States Court of Appeals for the Eighth Circuit), (cc: counsel) (dc) [Entry date January 3, 1995]
January 5, 1995	MOTION by defendant William Jefferson Clinton to stay pending appeal (dc)
January 5, 1995	MEMORANDUM by defendant William Jefferson Clinton in support of motion to stay pending appeal [36-1] (dc)
January 9, 1995	CERTIFICATE REGARDING TRANSCRIPT by defendant William Jefferson Clinton (dc)
January 9, 1995	Statement of issues on Appeal by defendant William Jefferson Clinton [35-1](dc)
January 13, 1995	DOCKETING LETTER: United States Court of Appeals for the Eighth Circuit-Number 95-1050; counsel to proceed on appendix (dc)
January 17, 1995	MEMORANDUM by plaintiff Paula Corbin Jones in opposition to motion to stay pending appeal [36-1] (dc)
January 17, 1995	NOTICE of cross-appeal by plaintiff Paula Corbin Jones from District Court decision [34-1] (appeal fees paid) (Two certified copies to Clerk of the United States Court of Appeals for the Eighth Circuit), (cc: counsel) (dc)

January 18, 1995	REPLY by defendant Clinton to plaintiff's opposition to motion for stay of discovery pending appeal [36-1] (dc) [Entry date January 19, 1995] [Edit date March 3, 1995]
January 25, 1995	DOCKETING LETTER: United States Court of Appeals for the Eighth Circuit Number 95-1167; counsel to proceed on appendix (dc)
February 24, 1995	ORDER by Judge Susan W. Wright granting President Clinton's motion to stay pending appeal [36-1] (cc: all counsel) EOD February 24, 1995 (vjt)
March 1, 1995	ORDER by Judge Susan W. Wright directing the Clerk to substitute the attached page 2 for the corresponding page in its Order on February 24, 1995 [42-1]; the new page deletes part of footnote one (cc: all counsel) EOD March 1, 1995 (vjt)
April 1, 1996	ORDER by the Eighth Circuit Court of Appeals, suggestion for rehearing en banc is denied. Petition for rehearing by the panel is also denied (dc)
April 18, 1996	ORDER by the Eighth Circuit Court of Appeals, issuance of the mandate shall be stayed until final disposition of the case by the Supreme Court (dc)
May 10, 1996	ORDER by the Eighth Circuit Court of Appeals, President Clinton's motion to extend stay of mandate is denied (dc)

May 20, 1996 — NOTICE of filing petition for writ of certiorari with Supreme Court #95-1853 (dc) [Entry date May 21, 1996]

II. Relevant Docket Entries in *Jones v. Clinton*, Nos. 95-1050, 95-1167 (8th Cir.)

January 23, 1995 — Civil Case Docketed. (dlb) [95-1167]

January 23, 1995 — CERTIFIED copies of notice of cross-appeal, docket entries, and orders of July 21, 1994 and December 28, 1994. [95-1167] [528439] (dlb) [95-1167]

January 23, 1995 — SIMULTANEOUS OPINION RELEASE (dlb) [95-1167]

January 23, 1995 — CROSS APPEAL BRIEFING SCHEDULE: Designation of Record by appellee due on February 2, 1995 in 95-1050, in 95-1167 Appendix due on March 6, 1995 in 95-1050, in 95-1167 Appellant brief due on March 6, 1995 in 95-1050, in 95-1167 Appellee/Cross Appellant brief due on April 5, 1995 in 95-1050, in 95-1167 Reply brief of Appellant/Cross-Appellee due on May 5, 1995 in 95-1050, in 95-1167 Reply brief Appellee/Cross Appellant due May 19, 1995 in 95-1050, in 95-1167 [95-1050, 95-1167] (dlb) [95-1050 95-1167]

February 1, 1995 — DESIGNATION of record received from Appellant William Jefferson Clinton in 95-1050. Type of appendix: separate [95-1050, 95-1167] (skh) [95-1050 95-1167]

February 1, 1995 — REMARKS: NO transcript. [95-1050, 95-1167] (skh) [95-1050, 95-1167]

February 13, 1995 — MOTION of appellant, William Jefferson Clinton, for extension of time to file brief until April 5, 1995. [95-1050, 95-1167] [537247] with service February 10, 1995 (skh) [95-1050 95-1167]

February 13, 1995 — ORDER filed: granting appellant motion for extension of time to file brief [537247-1] [537248] in 95-1050, 95-1167 Appellant brief now due on April 5, 1995 in 95-1050, in 95-1167(skh) [95-1050 95-1167]

April 5, 1995 — BRIEF FILED - Brief of Appellant - William Jefferson Clinton in 95-1050. 49 pages - with addendum - 10 copies - with service April 5, 1995. [95-1050, 95-1167] [556249] (rla) [95-1050 95-1167]

April 5, 1995 — RECORDS received: Appendix filed by Appellant William Jefferson Clinton in 95-1050, 95-1167 consisting of one Volume, 3 Copies. [95-1050, 95-1167] (rla) [95-1050 95-1167]

April 5, 1995 — BRIEF FILED - Brief of Amicus Curiae - Akhil Reed Amar, et al in 95-1050 and 95-1167 on behalf of appellant/cross-appellee William Jefferson Clinton in 95-1050 and 95-1167 17 pages - 10 copies with service April 4, 1995. [95-1050, 95-1167] [556766] (rla) [95-1050 95-1167]

April 7, 1995	Clerk Letter sent granting motion for leave to appear as amicus and filed brief [95-1050, 95-1167] (rla) [95-1050 95-1167]
April 10, 1995	BRIEF FILED - Brief of Amicus Curiae United States in 95-1050, and 95-1167 on behalf of appellant William Jefferson Clinton in 95-1050 and 95-1167 - 30 pages (per order of March 22, 1995) - copies with service April 5, 1995. [95-1050, 95-1167] [557923] (rla) [95-1050 95-1167]
April 11, 1995	MOTION of appellee/cross-appellant, Paula Corbin Jones in 95-1050 and 95-1167, for Expedited Appeal. [95-1050, 95-1167] [560041] with service April 10, 1995 (rla) [95-1050 95-1167]
April 12, 1995	RESPONSE of appellant/cross-appellee, William Jefferson Clinton in 95-1050/ 95-1167, in opposition to appellee motion for Expedited Appeal filed by Paula Corbin Jones [560041-1] [560043] in 95-1050. (rla) [95-1050 95-1167]
April 13, 1995	MOTION of appellee/cross-appellant, Paula Corbin Jones in 95-1050 and 95-1167, to file a reply to appellant/cross appellee letter in opposition. [95-1050, 95-1167] [560047] with service April 12, 1995 (rla) [95-1050 95-1167]

April 13, 1995	REPLY filed by appellee/cross-appellant in 95-1050 and 95-1167 regarding appellant's opposition to appellee's motion to expedite briefing. [95-1050, 95-1167] (rla) [95-1050 95- 1167]
April 17, 1995	JUDGE ORDER: Appellee's motion to expedite the briefing schedule and place this case on the June oral argument calendar, appellant's response in opposition and appellee's reply thereto have been referred to the Court for decision. After review, the Court hereby denies appellee's motion to expedite briefing and placement on the oral argument calendar. This case shall proceed upon the established briefing schedule absent the filing of any party's brief before the scheduled deadline. Counsel is reminded that any early filing will automatically advance the briefing schedule. This case shall be placed on the oral argument calendar in the ordinary course. [560054] in 95-1050, 95-1167 (rla) [95-1050 95-1167]
May 1, 1995	BRIEF FILED - Brief of Amicus Curiae - ACLU in 95-1050, ACLU in 95-1167 on behalf of appellee/cross-appellant Paula Corbin Jones in 95-1050 and 95-1167 20 pages - 10 copies with service April 28, 1995. [95-1050, 95-1167] [567183] (rla) [95-1050 95-1167]

May 8, 1995	BRIEF FILED - Brief of appellee/cross-appellant - Appellee Paula Corbin Jones in 95-1050, 95-1167. 50 pages - 11 copies with service May 5, 1995. [95-1050, 95-1167] [570083] (rla) [95-1050 95-1167]
May 22, 1995	BRIEF FILED - Brief of Amicus Curiae - on behalf of appellee Paula Corbin Jones; Stephen B. Burbank in 95-1050, Stephen B. Burbank in 95-1167 20 pages- 10 copies with service May 5, 1995.[95-1050, 95-1167] [575756] (rla) [95-1050 95-1167]
June 6, 1995	BRIEF FILED - Reply Brief of appellant/cross-appellee - William Jefferson Clinton in 95-1050, William Jefferson-Clinton in 95-1167. 34 pages - 10 copies - with service June 5, 1995. [95-1050, 95-1167] [579630] (rla) [95-1050, 95-1167]
June 20, 1995	BRIEF FILED - Reply Brief of appellee/cross-appellant - Paula Corbin Jones in 95-1050, 95-1167. 12 pages - 11 copies - with service June 19, 1995. [95-1050, 95-1167] [585275] (rla) [95-1050, 95-1167]

September 14, 1995	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Pasco M. Bowman, Circuit Judge, Donald R. Ross, Circuit Judge, C. A. Beam, Circuit Judge. Robert S. Bennett for Appellant/Cross-Appellee William Jefferson Clinton in 95-1050 and 95-1167. Gilbert K. Davis for Appellee/Cross-Appellant Paula Corbin Jones in 95-1050 and 95-1167. Rebuttal by: Mr. Bennett. RECORDED. [95-1050, 95-1167] (mel) [95-1050, 95-1167]
January 9, 1996	THE COURT: Pasco M. Bowman, Donald R. Ross, C. A. Beam. OPINION FILED by Pasco M. Bowman; separate CONCUR by C. A. Beam; DISSENT by Donald R. Ross. PUBLISHED. [95-1050, 95-1167] [659043] (mjh) [95-1050 95-1167]
January 9, 1996	JUDGMENT: Pasco M. Bowman, Donald R. Ross, C. A. Beam: The judgment of the lower court is AFFIRMED in part, REVERSED in part and REMANDED to the district court for proceedings consistent with the opinion of this court. [95-1050, 95-1167] [659052] (mjh) [95-1050 95-1167]
January 23, 1996	PETITION for REHEARING with suggestion for rehearing en banc. Filed by Appellant William Jefferson Clinton in 95-1050/1167 with service January 23, 1996, TO COURT. [95-1050, 95-1167] (mjh) [95-1050 95-1167]

January 29, 1996	Clerk letter sent notifying that appellee has an opportunity to respond to petition for rehearing with suggestion for rehearing en banc filed by William Jefferson Clinton, [665168-1] in 95-1050, [665168-1] in 95-1167 [95-1050, 95-1167] Response due by February 8, 1996 in 95-1050, in 95-1167 (mjh) [95-1050, 95-1167]
January 31, 1996	BRIEF TENDERED - Brief of Amicus Curiae - United States in 95-1050/1167 on behalf of Appellant in support of suggestion for rehearing en banc. 21 copies with service January 30, 1996, TO COURT. (mjh) [95-1050, 95-1167]
January 31, 1996	MOTION of United States Department of Justice for leave to file brief in support of appellant's suggestion for rehearing en banc as amicus curiae. [95-1050, 95-1167] [668942], TO COURT. with service January 30, 1996 (mjh) [95-1050 95-1167]
February 7, 1996	JUDGE ORDER: The Department of Justice's motion to file an amicus brief in support of the Petition for Rehearing and Suggestion for Rehearing En Banc has been considered by the Court and is granted. Chief Judge Richard S. Arnold and Judges Morris S. Arnold and Diana E. Murphy took no part in the consideration of this motion. [668942-1] [95-1050, 95-1167] [671416] in 95-1050, 95-1167 (mjh) [95-1050, 95-1167]

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

15 and 16

April 16, 1995	JUDGE ORDER: The appellant's motion to stay the mandate pursuant to Federal Rules of Appellate Procedure 41(b) has been considered by the Court and is granted. The issuance of the mandate in this case shall be stayed to and including May 16, 1996. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court. [693558-1] [95-1050, 95-1167] [698076] in 95-1050, 95-1167, granting appellant motion to stay mandate [693558-1] [95-1050, 95-1167] [698076] in 95-1050, 95-1167 (mjh) [95-1050 95-1167]
May 3, 1996	MOTION of appellant, William Jefferson Clinton in 95-1050, William Jefferson Clinton in 95-1167, for extension of the stay of mandate. [95-1050, 95-1167] [705490], TO COURT. With service May 2, 1996 (mjh) [95-1050 95-1167]
May 6, 1996	RESPONSE of appellee, Paula Corbin Jones in 95-1050/95-1167, in opposition to appellant motion for extension of the stay of mandate filed by William Jefferson Clinton, [705490-1] [95-1050, 95-1167] [706138] in 95-1050, [705490-1] [95-1050, 95-1167] [706138] in 95-1167, TO COURT. (ema) [95-1050 95-1167]

May 8, 1996	JUDGE ORDER: President Clinton's motion to extend the stay of mandate has been considered by the Court and is denied. Judge Ross voted to grant the motion. [705490-1] filed by William Jefferson Clinton [95-1050, 95-1167] [706966] in COURT. (ema) [95-1050 95-1167]
May 8, 1996	JUDGE ORDER: President Clinton's motion to extend the stay of mandate has been considered by the Court and is denied. Judge Ross voted to grant the motion. [705490-1] filed by William Jefferson Clinton [95-1050, 95-1167] [706966] in 95-1050, 95-1167 (mjh) [95-1050 95-1167]
May 16, 1996	United States Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on May 15, 1996. Supreme Court Case No. 95-1853 [95-1050, 95-1167] [710667] (mjh) [95-1050 95-1167]
July 3, 1996	Notification from Supreme Court dated-June 24, 1996 stating that it had entered an order granting certiorari in the Supreme Court [710667-1] in 95-1050, 95-1167 [95-1050, 95-1167] (mjh) [95-1050 95-1167]

Supreme Court, U.S.
FILED
AUG 8 1996
CLERK

No. 95-1853

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONER

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59 pp

QUESTIONS PRESENTED

1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until the President leaves office.
2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.

PARTIES TO THE PROCEEDING

Petitioner, President William Jefferson Clinton, was a defendant in the district court and appellant in the court of appeals. Respondent Paula Corbin Jones was the plaintiff in the district court and cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.

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No. 95-1853

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 72 F.3d 1354. The court of appeals' order denying the petition for rehearing (Pet. App. 32) is reported at 81 F.3d 78. The principal opinion of the district court (Pet. App. 54) is reported at 869 F. Supp. 690. Other published opinions of the district court (Pet. App. at 40 and 74) appear at 858 F. Supp. 902 and 879 F. Supp. 86.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition for rehearing was filed on January 23, 1996, and denied on March 28, 1996. A petition for certiorari was filed on May 15, 1996, and granted on June 24, 1996. This Court's jurisdiction is based on 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983 (1994)

42 U.S.C. § 1985 (1994)

FED. R. CIV. P. 40

These provisions are set forth at Pet. App. 79-85.

STATEMENT

Petitioner William Jefferson Clinton is President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed this civil damages action against the President in the United States District Court for the Eastern District of Arkansas. The complaint was based principally on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under federal civil rights statutes and two arising under state tort law, and sought $175,000 in actual and punitive damages for each of the four counts.[1] Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343 (1994).

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[1] The first two counts allege that in 1991, when the President was Governor of Arkansas and respondent a state employee, he subjected respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (1994). A third claim alleges that the President thereby inflicted emotional distress upon respondent. Finally, the complaint alleges that in 1994, while he was President, petitioner defamed respondent through statements attributed to the White House Press Secretary and the President's lawyer, denying her much-publicized allegations against the President.

Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts. Respondent alleges that Trooper Ferguson approached her on the President's behalf, thereby conspiring with the President to deprive

(continued . . .)

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office. He asserted that such a course was warranted by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed the trial until the President left office, but held that discovery could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]" (Pet. App. 67), which held that a President is absolutely immune from any civil liability for his official acts as President. The district court noted that the holding of *Fitzgerald* did not directly apply to this case because President Clinton was sued primarily for actions taken before he became President, but concluded that a significant part of the rationale in *Fitzgerald* did apply here:

> [T]he majority opinion by Justice Powell [in *Fitzgerald*] is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office.

Pet. App. 68-69. The district court stated that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." Pet. App. 69. In this connection, the district

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[1](. . . continued)
respondent of her civil rights in violation of 42 U.S.C. § 1985. Respondent also alleges that Mr. Ferguson defamed her in statements about a woman identified only as "Paula," which were attributed to an anonymous trooper in an article about President Clinton's personal conduct published in *The American Spectator* magazine. Neither the publication nor the author was named as a defendant in the suit.

court stated that "this [is not] a case that would likely be tried with few demands on Presidential time." Pet. App. 70.

The district court also stated that "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Noting that respondent "filed this action two days before the three-year statute of limitations expired" and that she "[o]bviously . . . was in no rush to get her case to court," the district court found that "a delay in trial . . . will not harm [respondent's] right to recover or cause her undue inconvenience." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge concluded that the trial should be stayed, "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.[2] The trial court ruled, however, that there was "no reason why the discovery and deposition process could not proceed," and said that this would avoid the possible loss of evidence with the passage of time. Pet. App. 71.

The President and respondent both appealed.[3] A divided panel of the court of appeals reversed the district court's order staying trial, and affirmed its decision allowing discovery to proceed. The majority opinion, by Judge Bowman, determined that the Constitution does not confer on the President any protection from civil actions that arise from his unofficial

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[2] The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found that there was "too much interdependency of events and testimony to proceed piecemeal," and that "it would not be possible to try the Trooper adequately without testimony from the President." Pet. App. 71.

[3] The court of appeals' jurisdiction over the President's appeal was based on 28 U.S.C. § 1291 (1994). *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones's cross-appeal. *See infra* pp. 43-45.

acts. Pet. App. 16. Judge Bowman acknowledged that "the fundamental authority" on the question before the Court was *Nixon v. Fitzgerald*, but stated that the reasoning of *Fitzgerald* is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 8, 11. After asserting that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the stay of trial issued by the district court (Pet. App. 5 n.4), Judge Bowman overturned even that limited stay as an abuse of discretion. Pet. App. 13 n.9.

Judge Bowman also put aside concerns that a trial court's exercise of control over the President's time and priorities through the supervision of discovery and trial would do violence to the separation of powers. Pet. App. 12-14. He stated that any separation of powers problems could be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13.

Judge Beam "concur[red] in the conclusions reached by Judge Bowman." Pet. App. 17. He acknowledged that the issues in this case "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. *Id.* He also recognized that "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" is a matter of "major concern." Pet. App. 21. He asserted, however, that this litigation could be managed with a "minimum of impact on the President's schedule." Pet. App. 23. This could be accomplished, he suggested, by the President's not attending his own trial and not participating in discovery, and by limiting the number of pretrial encounters between the President and respondent's counsel. Pet. App. 23-24.

Judge Ross dissented. Pet. App. 25-31. Noting that "[n]o other branch of government is entrusted to a single person," he stated: "It is this singularity of the President's con-

stitutional position that calls for protection from civil litigation." Pet. App. 26.

> The burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result would disserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution.

Id. Judge Ross concluded that "unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term." Pet. App. 25. He stated that this conclusion was compelled by the "language, logic and intent" of *Fitzgerald*. Pet. App. 25.

Judge Ross further explained that a lawsuit against a sitting President would "create opportunities for the judiciary to intrude upon the Executive[]" and "set the stage for potential constitutional confrontations between courts and a President." Pet. App. 28. In addition, he noted, such litigation "permit[s] the civil justice system to be used for partisan political purposes." *Id.* At the same time, he stated, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

The court of appeals denied the President's request for rehearing *en banc*. Three judges did not participate, and

Judge McMillian dissented. Judge McMillian stated that the panel majority's holding "demean[ed] the Office of the President." Pet. App. 32. He further stated that the holding "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed filing for at least *three* years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

SUMMARY OF ARGUMENT

I.A. The President, unlike any other federal official, has the sole responsibility for an entire branch of the federal government. For that reason, litigation against the individual who is serving as President unavoidably impinges on the constitutional responsibilities of the Executive Branch. The Framers explicitly recognized this point, as has this Court, on several occasions.

A personal damages action is bound to be burdensome and disruptive. This is especially so in a lawsuit that seeks to impugn a defendant's reputation and threatens him with enormous financial liability. It is inconceivable that anyone, including the President, could remain disengaged from such proceedings. Even if a President ultimately prevails, protracted personal damages litigation would make it impossible for him to devote his undivided energies to one of the most demanding jobs in the world. Judge Learned Hand once commented that, as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness and death."[4] In this respect the President is like any other litigant. The President's litigation, however, like the President's illness, becomes the nation's problem.

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[4] 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105 (1926), *quoted in Fitzgerald*, 457 U.S. at 763 n.6 (Burger, C.J., concurring).

There is also no reason to believe that, if it is established that private damages actions against sitting Presidents may go forward, such suits would be rare. To the contrary, parties seeking publicity, partisan advantage or a quick settlement will not forbear from using such litigation to advance their objectives. The usual means of discouraging or disposing of unfounded civil complaints would be especially ineffective in these cases.

B. Even the panel majority did not dispute the basic point that personal damages litigation against an incumbent President threatens the functioning of the Executive Branch. Deferral of litigation against an incumbent President would wholly eliminate this problem, while still enabling courts to provide effective relief for wrongdoing. The panel, however, rejected deferral of the litigation as a remedy, and instead concluded that "case management" by the trial court could adequately protect the interests at stake. But "case management" only exacerbates separation of powers problems, by entangling the Executive and Judicial Branches in an ongoing and mutually damaging relationship.

In concrete terms, trial court "case management" means that whenever a President believes that his responsibilities require a change in the schedule of litigation against him, he will have to seek the approval of the trial judge, state or federal. That judge will be authorized to insist on an explanation of the President's reasons for seeking a schedule change, a problematic state of affairs in itself. The trial judge will then review the President's explanation and decide whether to accept it, or whether the President should instead rearrange his official priorities to devote more time and attention to the litigation.

The President's priorities, however, are inseparable from the priorities of the Executive Branch of the federal government. Judges should not be in the position of reviewing those priorities. If they are, the effect will be to enmesh the President and the judiciary, to the great detriment of both branches, in a series of controversies over highly sensitive and, in an important sense, deeply political issues about the President's official priorities.

Moreover, state courts are likely to become the natural venue for private civil damages actions against an incumbent President, because such suits often will not involve federal claims. The Framers were well aware of the potential for conflict between the states and the federal government, particularly the Executive Branch of the federal government. They could not possibly have contemplated that state trial judges would have the power to control a President that is inherent in "case management" -- much less that they would have the power to compel an incumbent President to stand trial in a state court. This further demonstrates that deferral, not "case management," is more consistent with our constitutional scheme.

C. The temporary deferral that the President seeks here is not, contrary to the court of appeals, an extraordinary remedy, and it does not place the President "above the law." In a variety of circumstances -- ranging from the automatic stay in bankruptcy to the doctrine of primary jurisdiction to the suspension of civil actions while criminal proceedings are pending -- litigation is delayed in our system in order to protect significant public or institutional interests. The public interest in protecting the Presidency from disruption is at least as strong as, if not stronger than, the interests underlying these well-established doctrines.

Deferral also does not place unreasonable burdens on respondent. In many cases -- for example, where absolute, qualified, or diplomatic immunities apply -- settled doctrines deny recovery outright to innocent individuals who may have been grievously injured. Deferral of this litigation, by contrast, will not preclude respondent from ultimately seeking a remedy and, if warranted, recovering damages. Deferral

leaves the President no less accountable for his conduct. Only the timing of the litigation is affected.

II. Respondent's suit, in particular, should be deferred under separation of powers principles. The suit is based on conduct that occurred before the President took office, and therefore presents no risk of abuse of Presidential power. Respondent seeks only damages, and can be made whole even if the proceedings are delayed. The suit involves the President personally and directly, not peripherally, so it is especially likely to impinge on his ability to perform his official duties. And respondent could have sought relief long before the President assumed office, or sought other avenues of relief, but chose not to do so.

For these and all the reasons set forth more fully below, the decision of the court of appeals should be reversed, and this litigation should be deferred in its entirety until the President leaves office.

ARGUMENT

I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.

A. A Personal Damages Action Against An Incumbent President Would Interfere With The Discharge Of A President's Article II Responsibilities And Jeopardize The Separation Of Powers.

1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.

Under our system of government, the Executive Branch is the sole responsibility of the individual who has been elected President. Anything that significantly affects that individual will affect the functioning of the Executive Branch as well. For this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

That the President "occupies a unique position in the constitutional scheme" (*Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power. The President alone is director of all the executive departments and Commander-In-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. CONST. art. II, §§ 2-3. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group

or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See* THE FEDERALIST Nos. 70-77 (Alexander Hamilton).[5]

The extraordinary character of the Presidency in this respect is woven into the very fabric of the Constitution. The Constitution envisions that Congress will be in session for a period of time and then adjourn. U.S. CONST. art. I, §§ 4, 5, 7. The Presidency, however, is always "in session;" the Presidency never adjourns.[6] The Constitution further provides specific steps to replace the President in the event of his disability. U.S. CONST. amend. XXV, §§ 3-4. These provisions, made for no other federal officer, further confirm that the Presidency is inseparable from the individual who is President.

The unadorned words of the Constitution do not fully convey the momentous and unrelenting burdens on every President. "[T]he President, for all practical purposes . . . affords the only means through which we can act as a nation."[7]

> The range of the President's functions is enormous. He is ceremonial head of the state. He is a vital

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[5] *See* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978): "The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government."

[6] Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon And Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) ("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.").

[7] George E. Reedy, *Discovering the Presidency*, N.Y. TIMES, Jan. 20, 1985, at G1, *quoted in* LOU CANNON, PRESIDENT REAGAN -- THE ROLE OF A LIFETIME 147 (1991).

> source of legislative suggestion. He is the final source of all executive decision. He is the authoritative exponent of the nation's foreign policy.[8]

Although he has many advisers, the President alone is ultimately accountable for a myriad of decisions affecting profoundly important questions of national and international policy -- such as dispatching military forces as exigencies require; helping to negotiate peace in regions vital to our national interest; deciding whether to sign or veto legislation; and negotiating with Congress on budgetary, tax and many other crucial issues. The President's obligations to the office, moreover, never cease; serious crises can, and often do, erupt unexpectedly, commanding the President's immediate attention.[9]

> To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the

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[8] HAROLD J. LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION 26 (1940), *quoted in* CANNON, *supra* note 7, at 147.

[9] This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of KAL Flight 007 while on vacation. CANNON, *supra* note 7, at 191, 399, 420. President Carter spent one vacation reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. JIMMY CARTER, KEEPING FAITH -- MEMOIRS OF A PRESIDENT 57 (1982). President Clinton was notified of the terrorist bombing of U.S. military personnel on the eve of the G-7 economic summit, causing him both to change his priorities for the summit and to return to the U.S. before it was over to attend memorial services. Associated Press, *Clinton Calls For Unity Against Terrorism*, CHI. TRIB., June 27, 1996, at A1.

energies of a single man unsurpassed by the exigencies of any other political office in the world.[10]

2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With The Historic Understanding Of Relations Between The Executive And Judicial Branches.

The nation's courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753 & n.34. Accordingly, courts historically have refrained from exercising jurisdiction over the President personally, except in cases of imperative need, and then only to the most limited extent possible. *See id.* at 753-54.

This Court repeatedly has recognized that the President's unique status and range of responsibilities under the Constitution distinguish him from all other federal officers. *Id.* at 749-50. A President is absolutely immune from personal liability for any action taken in connection with his official duties. *Id.* at 749. A President's communications are presumptively privileged, and that privilege can be overridden only in cases of exceptionally strong public need. *United States v. Nixon*, 418 U.S. 683, 705 (1974). Similarly, there is an "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular executive acts. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring); *see id.* at 802-03 (plurality opinion of O'Connor, J.). And the Department of Justice, speaking through then-Solicitor General Robert H. Bork, has taken the position -- based on explicit language in *The Federalist* -- that while an incumbent Vice-President is subject to criminal prosecution, the President

[10] LASKI, *supra* note 8, at 26.

must be impeached and removed from office before he can be prosecuted.[11] All of these protections are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.[12]

This tradition of judicial deference and restraint toward the Presidency -- a tradition that "can be traced far back into our constitutional history" (*Fitzgerald*, 457 U.S. at 753 n.34) -- bars personal damages litigation against an incumbent President. Over 150 years ago, Justice Story explained why such litigation cannot go forward while the President is in office:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included

[11] *See* THE FEDERALIST No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 77, at 464 (Alexander Hamilton); *id.* No. 65, at 398-99 (Alexander Hamilton); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1966) (noting the comment of Gouvenour Morris); *id.* at 626 (comment of James Wilson). Solicitor General Bork explained that the unique burdens of the President's duties distinguished him in this regard from all other federal officers:

> [The Framers] assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 17, *In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972*, (No. 73-965) (D. Md. filed Oct. 5, 1973) (C.A. App. 92).

[12] This Court repeatedly has stated that a specific textual basis is not necessary to support such incidents of the President's office. *Fitzgerald*, 457 U.S. at 750 n.31; *Nixon*, 418 U.S. at 705 n.16.

> the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833), *quoted in Fitzgerald*, 457 U.S. at 749.

The second and third Presidents of the United States held the same view. John Adams explained that the President personally is not subject to any process whatever, for to permit otherwise would "put it in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government."[13] President Jefferson was even more emphatic:

> [W]ould the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?[14]

As this court stated in *Fitzgerald*, "nothing in [the Framers'] debates suggests an expectation that the President would be

[13] THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (recording a discussion between then-Vice President Adams and Senator Oliver Ellsworth during the first Congress) (Kenneth R. Bowling and Helen E. Veit eds., 1988).

[14] 10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905) (emphasis in original), *quoted in Fitzgerald*, 457 U.S. at 751 n.31.

subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31.[15]

The traditional practice has been fully consistent with this historical doctrine. It is, of course, "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President," *Fitzgerald*, 457 U.S. at 753-54, and Presidents, including this one, have sought to accommodate the interests of the courts, particularly their interest in the fair administration of criminal justice, where accommodation can be accomplished consistent with Presidential functions. *See infra* pp. 26-28. These interests have not heretofore been thought to require an incumbent President's participation as a defendant in a private civil damages suit, however.

To the contrary, it "has been taken for granted for nearly two centuries," *Fitzgerald*, 457 U.S. at 758 (Burger, C.J., concurring), that one could not hale an incumbent President into court and seek damages from him personally. So far as can be determined, no President has ever been required even to give evidence in a civil proceeding, let alone appear as a defendant. No President has ever been compelled to appear personally and testify at trial in any case, civil or criminal. President Jefferson was sued for official actions he took while he was President, but notably, not until after he left office.[16] Three other Presidents had civil damages litigation pending against

[15] While there are some statements by contemporaries of the Framers that questioned the notion of Presidential immunity to civil suit, the majority in *Fitzgerald* observed in response that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

[16] *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411) (suit for trespass, based on federal seizure of land, dismissed for want of venue).

them during their tenure in office, but in each case, suit was filed before they took office; two were effectively disposed of before the President was sworn in; and none was actively litigated while the defendant served as President.[17] This "prolonged reticence" about suing an incumbent President is powerful evidence of a nearly universal understanding that such litigation is inconsistent with our constitutional scheme. *See Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1458 (1995).

In *Fitzgerald*, the Court explained that historically the President has been subjected to a court's jurisdiction only when necessary to serve a compelling, broad-based constitu-

[17] In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, *id.*, nine months before he assumed the Presidency. The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. *Id.*

In *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944, *id.* at 31, and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. *Id.* at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable for injuries incurred while riding in a car leased to his campaign. Complaint, *Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960 and subsequently consolidated) (C.A. App. 128, 135) (hereinafter "*Bailey*"). The court did not permit the plaintiffs to take the President's deposition, permitting the President to respond by way of written interrogatories. *Bailey*, Order Denying Motion for Deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. *See infra* note 22.

tional or public interest, and only when the exercise of jurisdiction would not unduly intrude on the functions of the office. 457 U.S. at 753-54. The Court gave two examples of such exceptional cases: those seeking to curb abuses of Presidential authority and maintain separation of powers, *id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); and those seeking to vindicate the public interest in criminal prosecutions. *Id.* (citing *United States v. Nixon*, 418 U.S. at 703-13). Noting that there is a lesser public interest in actions for civil damages than in criminal proceedings, *id.* at 754 n.37, the Court in *Fitzgerald* concluded that a "merely private suit for damages based on a President's official acts" does not warrant the exercise of jurisdiction over a President. *Id.* at 754.[18]

Until the unprecedented decision by the court of appeals in this case, private civil damages litigation has not been thought to warrant an exception to the teaching of the Framers. To the contrary, such litigation does not serve the broad-based, compelling public or constitutional interests enumerated in *Fitzgerald*. To allow it to proceed would be an abrupt break with well-established principles of American jurisprudence.

[18] In the few cases where plaintiffs have sought to compel or restrain official action by a President, courts consistently have resorted to procedural or jurisdictional devices to dismiss the claims or to avoid issuing relief directed at the President personally. *See, e.g., Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866) (discretionary Presidential decision-making held unreviewable); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissed for lack of ripeness). *See also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion of O'Connor, J.) (relief may be directed to defendants other than President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).

3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To Discharge His Constitutional Responsibilities.

In *Nixon v. Fitzgerald*, this Court held that the President enjoys absolute immunity from damages liability for acts within the "outer perimeter" of his official duties. 457 U.S. at 756. The logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here -- the temporary deferral of private civil litigation.

Fitzgerald relied upon three significant grounds. First, the Court was concerned that to subject a President to liability for official conduct would inhibit him in carrying out his duties fearlessly and impartially, and would inject courts improperly into Presidential decision-making. *Id.* at 752 & n.32. Second, the Court stated, "[b]ecause of the singular importance of the President's duties," the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. And third, the Court was concerned that the "sheer prominence of the President's office" would make him "an easily identifiable target for suits for civil damages." *Id.* at 752-53.

This case is different from *Fitzgerald*, of course, in that it largely does not touch upon official actions. Accordingly, it does not warrant, and the President does not seek, any immunity from liability. But because this case involves a sitting President, it directly implicates the two other critical concerns that prompted the decision in *Fitzgerald*: the President's vulnerability to civil damages actions and the diversion of the President's time and attention to attend to such litigation. These concerns are equally present whether the lawsuit is based on private conduct or official conduct. Defending a suit based on private conduct is not any less of an imposition on the President's ability to attend to his constitutional responsi-

bilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. Protection for the Presidency therefore is still required, albeit the much more limited protection of holding litigation in abeyance until the President leaves office.

A protracted lawsuit not only "ties up the defendant's time [but] prolongs the uncertainty and anxiety that are often the principal costs of being sued." *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993). The discovery phase alone of civil damages litigation would be an enormous imposition on a President's time and attention. "No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage to survive that ordeal, once again at trial."[19] Discovery, "used as a weapon to burden, discourage or exhaust the opponent," makes even a relatively minor case a costly and lengthy ordeal.[20] As this Court has recognized, "pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted).

The instant case clearly illustrates these points. Respondent's counsel have revealed their intention to pursue discovery aggressively, stating that, "all is on the table in . . . discovery . . . including evidence that can lead to admissible evidence." They announced that they will "fully pursue, and exhaustively pursue" allegations of purportedly related

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[19] Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 GA. L. REV. 1, 11 (1992).

[20] Hon. William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 179 (1991).

wrongdoing that go far beyond the limited contacts between the President and the respondent alleged in the complaint, ostensibly for the purpose of showing an alleged "pattern" of harassment and the purported misuse of government resources. They also have suggested they will ask the trial court to compel an unprecedented physical examination of the President.[21]

No President could ignore, or leave to others to handle, a lawsuit such as this, which focuses on his personal conduct, aims to impugn his integrity, and seeks to impose hundreds of thousands of dollars in damages on him personally. Indeed, one of the most significant misconceptions in the panel majority's reasoning is the notion that the President can remain disengaged from a personal damages action brought against him. The panel majority seemed to envision that, perhaps apart from giving a deposition and consulting briefly on a few occasions with his trial counsel, the President can essentially ignore the litigation. It was even suggested that the President could forego attending his own trial. Pet. App. 23-24 (Beam, J., concurring). In fact, if the President is a defendant, he will be entitled to -- and, as a practical matter, will simply have to -- devote considerable time and attention to his defense.

This would be true whether the litigation involved allegations regarding personal misconduct, as here, or a disputed commercial transaction. Any case relating to events in which the President personally was involved would require the President's participation at almost every stage. In order to protect his interests adequately, the President, like any responsible litigant, would be required to review the complaint and answer; prepare and assure the veracity of discovery responses; retrieve and review documents; assist counsel to prepare for other witnesses' depositions; review those depositions and other evidence in the case; review the opposition's pleadings and motions; and consult with counsel throughout the case. He also would have the right and the obligation to review and approve all pleadings and motions filed on his behalf. Beyond that, the President would have to prepare for and participate in his own deposition, and finally, attend trial -- perhaps for weeks -- in a courtroom far from Washington.

[21] Transcript, *Daybreak* (CNN television broadcast, Dec. 29, 1994) at 3-4 (comments of Joseph Cammarata) (C.A. App. 117-18); Transcript, *Nightline* (ABC television broadcast, Dec. 28, 1994) at 3-4 (comments of Gilbert Davis) (C.A. App. 122-23).

The panel majority's antiseptic notion that the President can remain aloof from a personal damages action against him simply does not conform to reality. The litigation would command a significant part of the President's time, while the urgent business of the nation competed for his attention. The President would be put to an impossible choice between attending to his official duties or protecting his personal interests in the litigation -- a choice that is unfair not just to the President, but more importantly, to the nation he serves.

Even one lawsuit would have the potential seriously to disrupt the President's conduct of his official duties, just as one lawsuit could disrupt the professional and personal life of any individual. But if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events. As this Court has envisioned, Presidents likely would become "easily identifiable target[s]" for private civil damages actions in the future. *Fitzgerald*, 457 U.S. at 753. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas at the expense of the public's interest in unimpeded constitutional governance.

In particular, any President is especially vulnerable to politically motivated "strike suits" financed or stimulated by partisan opponents of whatever stripe, hoping to undermine a President's pursuit of his policy objectives or to attack his in-

tegrity, and thereby diminish his effectiveness as a leader. Partisan opponents would also be tempted to file suit in order to take advantage of modern discovery techniques, unknown throughout most of our history, to uncover personal and financial information about the President, his family and close associates.[22] Use of the judicial system in this manner would corrode the political process.

Even if a claimant has a legitimate grievance, litigation against an incumbent President can deflect the exercise of the popular will by appropriating the President's time and energy, which properly belong not to the individual who sued the President, but to the nation as a whole. Therefore, "[w]e should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."[23]

Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents

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[22] The suit against John F. Kennedy, *supra* note 17, illustrates how plaintiffs can use litigation for purposes of political mischief and potential extortion. The plaintiffs believed President Kennedy's policies were inimical to their state. *Bailey*, Reply to Objections to Cross-Interrogatories at 4-5 (Sept. 28, 1962) (C.A. App. 156). They attempted to propound politically embarrassing interrogatories to Attorney General Robert F. Kennedy, who had been the President's campaign manager. They also sought to obtain information about Kennedy family finances, and used pleadings to allege that the President was using his office to harass them and their state. *See Bailey*, Cross-Interrogatories to Robert F. Kennedy (Sept. 20, 1962) (C.A. App. 162); *Bailey*, Reply To Objections To Cross-Interrogatories at 3-4 (Sept. 28, 1962) (C.A. App. 156). As fatuous as the allegations were, President Kennedy settled the suit for $17,750, a significant sum in 1963. *Two Suits Against Kennedy Settled*, L.A. HERALD-EXAMINER, Apr. 2, 1963 (C.A. App. 181). Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency.

[23] Amar & Katyal, *supra* note 6, at 713.

against meritless lawsuits filed for purposes of harassment, publicity or partisanship. *See* Pet. App. 15; Resp. C.A. Br. 30, 32-33. But those devices are far from foolproof, and for a variety of reasons, are likely to be ineffective in protecting the President.

The strongest deterrent of unfounded lawsuits is typically financial: usually an individual will not incur the expense of suit if there is no prospect of prevailing, and will not risk sanctions under Rule 11 of the Federal Rules of Civil Procedure if the suit is found to be frivolous. But financial restraints are overcome by other incentives when -- as many prominent business, entertainment and public figures have learned to their dismay -- plaintiffs can attain instant celebrity status or political impact simply by including allegations against such figures in a complaint filed in court. The notoriety that accompanies such a lawsuit is lucrative in and of itself, in the form of book or movie contracts, for both client and lawyer. Likewise, a frivolous but embarrassing claim may be filed because the target is perceived, as a President surely would be, as vulnerable to quick settlement. As Chief Justice Burger observed, suits against Presidents can be "used as mechanisms of extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And a party whose objective is to divert the President's energy and resources, or to uncover information through discovery, or to embarrass the President by making sensational allegations, might willingly incur the costs of litigation even if there is no hope of success on the merits.

Nor does a motion to dismiss or for summary judgment promise swift or painless relief for the target of meritless litigation. A potential private action easily could be drafted to entangle a President in embarrassing or protracted litigation simply by alleging claims based on unwitnessed one-on-one encounters, or by otherwise raising credibility issues. These kinds of claims are exceedingly difficult to dispose of under the standards that govern pre-trial motions. And, as Chief Justice Burger recognized in *Fitzgerald*, "even a lawsuit ulti-

mately found to be frivolous . . . often requires significant expenditures of time and money" to defend. "Ultimate vindication on the merits does not repair the damage." 457 U.S. at 763 (Burger, C.J., concurring).

4. Criminal Cases Where A President Has Been A Third-Party Witness Provide No Precedent For Requiring A Sitting President To Participate As A Defendant In Civil Damages Litigation.

The respondent and the panel majority below minimized the disruptive effect of civil litigation on the Presidency by comparing the full-scale defense of a personal damages action to the few occasions when a President has testified as a non-party witness in a criminal or legislative proceeding. *See* Pet. App. 22-23 (Beam, J., concurring). This comparison is not plausible. The isolated event of giving testimony in a proceeding to which one is not a party bears no resemblance to the burdens borne by a defendant in a civil action for damages. In fact, the lesson of cases involving Presidential testimony is more nearly the opposite of what respondent and the panel majority say: those cases show that requiring an incumbent President to submit as a defendant in a private damages action would go beyond anything a court has done before, with less justification.

As this Court has emphasized, the interests at stake in criminal cases are of an altogether different magnitude from the interests affected by private damages actions. *See, e.g., Fitzgerald*, 457 U.S. at 754; *United States v. Gillock*, 445 U.S. 360, 371-72 (1980). Not only is the public interest in the accurate outcome of a criminal prosecution far greater, *see, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935), but the defendant has a constitutional right under the Compulsory Process Clause of the Sixth Amendment to obtain evidence in a criminal proceeding. *United States v. Burr*, 25 F. Cas. 30, 33

(C.C.D. Va. 1807) (No. 14,692d). This right, of course, has no constitutional counterpart in civil cases.

Only once in our history, in *United States v. Nixon*, 418 U.S. 683 (1974), has the Supreme Court required a sitting President to give evidence. That case, of course, involved physical evidence, not the President's own testimony. Even so, the Court could not have been clearer that the limitation on Presidential autonomy was warranted only because of the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court expressly declined to extend its holding to civil proceedings. *See Nixon*, 418 U.S. at 709-10, 711-12 & n.19. In addition, the Court quoted, not once but twice, Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Id.* at 708 and 715 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694)).

Consistent with *Nixon* and *Burr*, lower courts have required a strong showing of need for the President's testimony.[24] Even then, courts have allowed it to be obtained only in a manner that limits the disruption of the President's offi-

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[24] *See Nixon*, 418 U.S. at 713 (subpoena enforced against the President because there was a "demonstrated, specific need for evidence in a pending criminal trial"); *see also United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996) (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (quoting *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990)); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena to President when defendant failed to show "that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

cial functions, such as by videotaped deposition.[25] Thus, obtaining even third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need or where the constitutional right to compulsory process is at stake.

Neither of these factors is present, however, in ordinary civil litigation. Criminal prosecutions additionally carry certain important safeguards that are absent in civil litigation: they must be approved by a public official, premised on a finding of probable cause, and often require approval by a grand jury. Civil litigation, by contrast, can be filed by any individual out of any motive. Accordingly, this Court has been careful never to suggest that a sitting President could be compelled even to give evidence as a third party in a civil proceeding. *See United States v. Nixon*, 418 U.S. at 712 n.19.

The issue here, of course, is not whether the President can be compelled to testify as a mere witness. It is, rather, whether he can be sued as a defendant. Whatever difficulties may be involved in arranging for the President to testify as a third-party witness, those difficulties would be increased exponentially if the President were made a defendant in a civil action for damages, which has the potential to interfere much more severely, over a much more extended period, with his ability to fulfill the unique and extraordinarily demanding responsibilities of his office. It would be highly incongruous to subject the President -- and the nation -- to these burdens solely on the basis of a civil complaint filed against him by a private party, when the alternative -- deferral -- avoids these problems entirely and provides reasonable protection for the interests of all parties.

[25] *See Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged Presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *Branscum*, *supra* note 24 (videotaped deposition); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parts would be shown at trial); *Poindexter*, 732 F. Supp. at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

B. "Case Management" By The Trial Court Does Not Mitigate, But Instead Exacerbates, The Separation Of Power Problems Created By Suits Against An Incumbent President.

1. "Case Management" By Federal District Courts Impermissibly Entangles The Branches Of Government By Permitting Courts To Examine, And Re-order, Executive Branch Priorities.

Even the panel majority did not deny that private damages actions against a sitting President threaten to interfere with the integrity of the Executive Branch and to undermine the separation of powers. Its solution to these problems, however, was not deferral, but was instead "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. This supposed cure is worse than the disease. "Case management" by the judiciary of a suit against the Chief Executive entangles the two branches in an ongoing and mutually harmful relationship, instead of maintaining the separation of the branches, as the Constitution envisions.

The panel majority suggested that throughout the litigation, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. Under this approach, the President would have to provide detailed information about the nature of pending Executive Branch matters requiring his attention, and the trial judge would have to pass judgment on the President's priorities. If the trial court -- state or federal -- decided that the President should devote more time

to the private litigation than to official duties, the question would arise whether it could enforce that decision by threatening the President with contempt of court or sanctions. *See* FED. R. CIV. P. 16(f). If the President disagreed with a decision of the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16.

Such a state of affairs is an extraordinary affront to the separation of powers. A trial judge -- state or federal -- would be examining the official priorities of the individual in whom the whole of "the executive Power" is vested. And the judge would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them.

The nature of the President's responsibilities makes it especially inappropriate for the courts to insist on answers to the kinds of questions that inevitably would be posed under this regime. In situations involving matters of national security, sensitive diplomatic issues, or confidential intelligence or law enforcement operations -- to take just a few obvious examples -- the trial judge immediately would be enmeshed in disputes that could ripen into deeply troubling constitutional confrontations. Moreover, even seemingly minor changes in the President's schedule are imbued with significant portent by observers, both foreign and domestic. It is therefore not uncommon for a President to seek to maintain a pretense of "business as usual" to mask an impending crisis, while simultaneously having to attend to the urgent matter at hand.[26]

[26] The experiences of Presidents Carter and Reagan provide dramatic examples: when the invasion of Grenada was being planned, President Reagan was week-ending at a Georgia golf club. He wanted to hurry back to Washington, but his advisors told him "that a change in [his] schedule might draw attention to the possibility of U.S. intervention." He decided to remain in Georgia, but participated in meetings by way of telephone. CANNON, *supra* note 7, at 441-42. Similarly, during the 1980 mission to rescue the hostages in Iran, President Carter "wanted to spend every moment monitoring the progress of the rescue mission, but had to stick to

(continued . . .)

In such circumstances, simply having to ask a court for a change in the litigation schedule obviously could be highly damaging.

Even in areas not involving sensitive foreign or domestic concerns, a trial court would, under the panel's "case management" approach, be able to second-guess judgments that are properly made only by the President. A myriad of important Presidential activities might warrant a change in a litigation schedule: foreign or domestic travel; contacting members of Congress to persuade them to vote for legislation; meetings with groups of citizens to call public attention to an issue; intensive briefings from advisers on complex subjects. If the President moved for a change in the litigation schedule to accommodate these interests, the denial of such a motion would effectively preempt the priorities of the Executive Branch.[27]

The panel majority seemed to believe that untoward consequences can be averted so long as "case management" is "sensitive" enough to the demands of the President's office. Pet. App. 13. But this misunderstands both the nature of the problem and the nature of separated powers. Because the President embodies a branch of government, his priorities *are* the priorities of the Executive Branch. It follows that "case management," when the President is the defendant, necessar-

[26](. . . continued)
[his] regular schedule and act as though nothing of the kind was going on." CARTER, *supra* note 9, at 514.

[27] President Carter, for example, cut short a vacation to return to Washington to urge the passage of natural gas legislation that he deemed crucial to his national energy policy. CARTER, *supra* note 9, at 322. If the President had been involved in some aspect of litigation rather than on vacation, under the panel majority's scenario, he would have had to ask a court -- perhaps even a state court -- for permission to change his plans. The court then would be deciding if the President's interest in passage of the natural gas legislation was sufficiently important to warrant an interruption in judicial proceedings.

ily means management of the business of the Executive Branch -- both in setting priorities for the President's time and in controlling the disclosure of information about the President's schedule.

"Case management" by trial judges not only threatens the independence of the Executive from the Judicial Branch; it also unfairly places judges in a position they should not have to occupy -- the political arena. In suits against the President, the trial judge will be operating in an atmosphere that is almost certain to be highly charged politically. Any significant decision that a judge makes will be scrutinized for signs of partisan bias for or against the President. Decisions that are routine in any other case, such as a decision to postpone the defendant's deposition, will if the President is the deponent become the subject of partisan speculation and comment.

Moreover, judges attempting to assess the sufficiency of a President's explanation inevitably will be asked to distinguish between a President's "political" activities, on the one hand, and his "official" activities on the other. Political activity, of course, is one of the responsibilities of a democratically-elected official, and, as has often been recognized, these kinds of distinctions are inappropriate for judges to make.[28] These problems can, and should, be avoided altogether by holding the litigation in abeyance until the defendant is no longer President.

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[28] *See United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (courts lack "manageable standards" by which to distinguish between political and official functions), *cert. denied*, 455 U.S. 999 (1982); *Winpisinger v. Watson*, 628 F.2d 133, 140 (D.C. Cir.) (claim deemed not justiciable because it required judicial determination of whether executive actions were motivated by genuine concern for public interest or by "political expediency"), *cert. denied*, 446 U.S. 929 (1980).

2. "Case Management" By State Trial Courts Is Inconsistent With Principles Of Federalism Inherent In The Constitutional Scheme.

Perhaps the clearest evidence of the superiority of deferral to "case management," given the postulates of our constitutional system, emerges when one considers that if private civil actions can be brought against a sitting President, they are likely to be brought in state courts. Two of the claims in this case are state tort claims, and one would expect that civil suits in damages against a President for matters unrelated to his official duties will often, as here, involve causes of action under state law.[29] If suit is brought in state court, decisions about the activities and priorities of the Executive Branch of the federal government will be made in the first instance by state trial court judges, including those chosen by partisan election. The President, moreover, may not be able to obtain immediate review of these decisions in a federal forum. The availability of interlocutory review would turn on the judicial procedures of the state forum, and then, the only federal forum available to the President would likely be this Court.

The vast majority of state judges would, of course, be highly conscientious in carrying out their responsibilities in such a situation, but even the possibility that an incumbent President could be subject to the jurisdiction of a state court further demonstrates that suits against a sitting President are inconsistent with our constitutional scheme. The Framers were well aware that state governments might come into conflict with the federal government, and particularly with the Executive Branch. It would take little ingenuity to contrive a

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[29] In the absence of diversity jurisdiction, suits based on a President's personal conduct ordinarily would not be removable. *See* 28 U.S.C. §§ 1441(b), 1442(a) (1994); *Mesa v. California*, 489 U.S. 121, 138-39 (1989).

state law damages action against a President unrelated to the conduct of his office. In an atmosphere of local partisan hostility to the President, the ability to bring such a suit in state court would be a powerful weapon in the hands of state interests -- one that the Framers could not possibly have intended to permit. This is further evidence that the approach most faithful to our constitutional scheme is not "case management," but the simple deferral of litigation until after the President leaves office, at which time any risk of disruption of the orderly functioning of the Executive is eliminated.

C. The Relief Sought Here Is Not Extraordinary, And Would Not Place the President "Above The Law."

A recurrent theme of both respondent and the panel majority is that the President's claim in this case is somehow extraordinary, both in the relief that it seeks and in the burden that it would place on respondent. This is wrong. The relief that the President seeks does not provide, in the panel majority's words, a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)". Pet. App. 13. On the contrary, the relief that the President seeks is afforded in a variety of circumstances to public officials and private citizens alike. At the same time, the burdens that temporary deferral of the litigation would impose on plaintiffs are limited and reasonable.

1. Deferring Litigation Is Not Extraordinary.

The deferral that the President seeks is properly classified with an unexceptional group of doctrines that provide for litigation to be stayed to protect important institutional or public interests. There are numerous such instances where civil plaintiffs must accept the temporary postponement of litigation:

- The automatic stay provision of the Bankruptcy Code provides that litigation against a debtor must be stayed as soon as a party files a bankruptcy petition. The institutional interest in the orderly resolution of the bankruptcy estate justifies the imposition of delay on the plaintiff's claims. The stay ordinarily remains in effect until the bankruptcy proceeding is completed or the bankruptcy court lifts the stay. 11 U.S.C. § 362 (1994). That stay affects all litigation that "was or could have been commenced" prior to the filing of the petition. *Id.* Under this provision, civil actions can be stayed for extended periods.[30] Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in a position similar to that she would be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.

- Courts defer civil litigation until the conclusion of a related criminal prosecution against the same defendant, if doing so is in the interests of justice or the public's interest in criminal law enforcement. That process may, of course, take several years. During that time, the civil plaintiff -- who may have been injured by a party who engaged in criminal conduct -- is afforded no relief.[31]

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[30] *See, e.g., Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Panzella v. Hills Stores Co.*, 171 B.R. 22, 23 (E.D. Pa. 1994). A bankruptcy judge also has discretion to order a stay even of third-party litigation, to which the debtor is not a party, if that litigation conceivably could have an effect on the bankruptcy estate. *See* 11 U.S.C. § 105 (1994); 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994), and cases cited therein.

[31] *See, e.g., Koester v. American Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976); *Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967).

- The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), permits civil claims by or against military personnel to be tolled and stayed while they are on active duty. It provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act.[32]

- The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may not provide the relief they seek. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 302-06 (1973). The process, which can take several years, is needed to ensure that a regulatory agency will be able to pursue its institutional agenda in an orderly fashion. *See, e.g., United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952)).

- Public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals routinely can delay litigation for a substantial period, even though the official ultimately may be found not to be entitled to immunity. In fact the stay attaches only in those cases where a trial court has initially rejected the claim of immunity.

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[32] President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation. Rather, the relief sought here emanates from the nature of the President's constitutional duties and principles of separation of powers.

We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples dispel any suggestion that the President, in asking that this litigation be deferred, is somehow seeking extraordinary relief, or that holding this or any other litigation in abeyance violates a plaintiff's right to access to the courts.

2. Presidents Remain Accountable For Private Misconduct.

The panel majority, invoking the term "immunity," also suggested at various points that the President was seeking a rule that would bar liability for alleged wrongful conduct committed outside the scope of his official responsibilities. This is untrue. The President seeks only to defer the litigation until he leaves office. He remains accountable for his conduct and will be amenable to potential liability at that time. Accordingly, relieving a President temporarily of the requirement to defend private civil damages action does not, as the respondent suggests, place the President "above the law." Resp. C.A. Br. 9.

Deferring damages litigation manifestly does not give Presidents free license to engage in private misconduct. As this Court has observed, there are formal and informal checks quite apart from civil damages that deter unlawful, tortious or unconstitutional behavior by Presidents or those who may run for office in the future. These include the prospect of impeachment in egregious cases, as well as "constant scrutiny by the press." *Fitzgerald*, 457 U.S. at 757. Plaintiffs can take their charges to the newspapers and broadcast media, as has been done here. "Other incentives to avoid misconduct . . . include a desire to earn reelection," *id.*, or in the case of those who seek the Presidency, the desire to be elected in the first instance. Further deterrence may be found in the concern of a President "for his historical stature." *Id.* And of course, a President would still remain liable for damages after leaving office.

Indeed, deferral stands in sharp contrast to much more sweeping protection -- absolute or qualified immunity from damages -- that the law provides to literally tens of thousands of public employees. These immunity doctrines do not just delay litigation, but leave innocent victims wholly without compensation, sometimes even in cases where an official's conduct amounts to gross abuse of individual rights.[33] Similarly, diplomats, members of their families and foreign heads of state are wholly immune from liability in this country, even for personal misconduct and criminal acts.[34] In all these cases, protection from liability is needed to "advance compelling public ends." *Fitzgerald*, 457 U.S. at 758. Temporarily excusing the President from the burdens of private civil litigation, a far more modest accommodation, serves even more "compelling public ends."[35]

[33] For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978), a judge was held absolutely immune from damages notwithstanding undisputed allegations that he ordered a mildly retarded teenager sterilized in an *ex parte* proceeding, without a hearing, without notice to the young woman, and without appointment of a guardian *ad litem*. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor was held absolutely immune from damages even though the plaintiff had obtained habeas corpus relief on the ground that the prosecutor knowingly used false testimony at a trial which led to plaintiff's murder conviction and death sentence.

[34] *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Skeen v. Brazil*, 566 F. Supp. 1414 (D.D.C. 1983); *In re Terrence K.*, 524 N.Y.S.2d 996 (N.Y. Fam. Ct. 1988). Head-of-state immunity, founded on long-standing principles of international common law, permits heads of state, including our own, "to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." *Lafontant*, 844 F. Supp. at 132. Diplomatic immunity, founded on the Vienna Convention, is a reciprocal immunity that exists "[t]o protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates." *Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996).

In sum, the President asserts a limited form of protection that is calibrated to accommodate a plaintiff's right to seek redress in the courts and the right of the people to have the person they elected President available to perform the unique and demanding responsibilities of that office. Because the plaintiff's right ultimately to seek redress is preserved, deferral also is in accordance with Chief Justice Marshall's declaration that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

II. THE LITIGATION OF THIS PARTICULAR PRIVATE DAMAGES SUIT AGAINST THE PRESIDENT SHOULD, IN ANY EVENT, BE DEFERRED.

A. Several Factors Weigh Heavily In Favor Of Deferring This Litigation In Its Entirety.

Even if it were determined that temporary insulation from private civil damages litigation is not presumptively mandated in every case involving the President, there remains the question of whether, under principles enunciated in this Court's separation of powers cases, litigation of this particular nature should go forward while the President is in office. We respectfully submit that it should not.

[35] Indeed, while we seek here only to defer the plaintiff's opportunity to pursue redress, we note that courts have, with few qualms, denied damages remedies altogether in other cases. "It never has been denied that . . . immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Fitzgerald*, 457 U.S. at 754 n.37.

In *Fitzgerald*, the Court framed the analysis that must be undertaken as follows: "a court, before exercising jurisdiction [over a President], must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. As the Court recently explained, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996). Accordingly, when action by another branch -- in this case the judiciary -- has "the potential for disruption" of Executive Branch functions, a court must "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority" of the Judicial Branch. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (hereinafter "*Nixon v. GSA*").

Providing a forum for the redress of civil rights and common law torts is, of course, an appropriate and important objective within the constitutional authority of the federal judiciary. The issue here, though, is whether there is an "overriding need" to promote this objective at this time, if doing so has the potential to disrupt the President's ability to perform his constitutional functions. The key is "to resolve those competing interests in a manner that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974). Temporarily deferring this litigation does just that.

Under the separation of powers principles elaborated in *Fitzgerald*, *United States v. Nixon*, and *Nixon v. GSA*, there is no justification for requiring this litigation to proceed while the President is in office. First, this suit involves the President both directly and personally. He is not a peripheral figure or one among many co-defendants. As the district court found, he is the "central figure in this action." Pet. App. 77. Moreover, given the nature of the allegations, this is the kind of litigation that he must attend to personally. It alleges

events in which only he and the respondent purportedly were involved, and directly attacks his reputation and integrity. Such litigation cannot be handled by, for example, the President's accountants or business associates. As discussed above, litigation of this nature is especially disruptive, because it would require the President's personal time and attention.

Second, this suit concerns alleged pre-Presidential conduct, rather than unofficial conduct that the President engaged in while in office. In a case of this kind, the plaintiff's need to press a claim during the President's incumbency is less compelling, because the plaintiff generally will have had an opportunity to sue before the President was elected, as was the case here. The public interest in allowing the suit to go forward is also less, because there is no risk that the defendant was seeking to take advantage of the Presidency at the time of the alleged wrong.

Third, and related, this is a case in which the plaintiff's delay in bringing suit after the President was elected is not readily understandable. Respondent claims that deferring the suit will prejudice her interests, but respondent is the author of her own predicament. This case does not involve a latent harm that only became known long after the fact. The facts alleged in the complaint were known to respondent at once, and the claims accrued well before the President took office. Moreover, respondent chose not to pursue other available avenues of potential recovery, such as a timely claim under Title VII, or a suit against the publisher and the author of the article in which she was allegedly defamed. Respondent instead waited three years to act, filing barely within the limitations period for civil rights actions, 16 months after the defendant became President. Irrespective of whether the doctrine of laches should formally apply, these facts suggest that deferral is especially appropriate here. When the plaintiff has delayed extensively before suing, there is reason to think that further delay will not harm the plaintiff's interests. By the

same token, when a plaintiff waits to bring suit based on pre-Presidential conduct until the President is elected, and chooses not to pursue other available remedies, the danger that the suit was prompted by illegitimate motives is obviously greater.

Finally, as the district court observed, "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Respondent seeks only damages. If she ultimately prevails, she will be made whole regardless of the delay.[36] Respondent also does not identify any special need for the damages she seeks and, in fact, has stated that she intends to donate any award to charity.[37] Again, in a suit seeking only damages, where a plaintiff can be made whole by prejudgment interest and has disclaimed personal or expedient need for financial recovery, the danger that respondent will be prejudiced is diminished, and the justification for the potential interference with the functioning of the Executive Branch is even further diminished.

Respondent's interest in vindicating her asserted rights, and the judiciary's interest in providing a forum for vindicating such rights, are not significantly impaired by deferring this litigation. When the burden on the Presidency is compared with the very minimal impairment of these interests, it becomes clear that this litigation should be deferred in its entirety until the President leaves office.

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[36] Prejudgment interest generally is available in appropriate circumstances under 42 U.S.C. § 1983 (1994). *See Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991). Prejudgment interest also is available under Arkansas law in appropriate cases. *Wooten v. McClendon*, 612 S.W.2d 105 (Ark. 1981) (prejudgment interest available in contract and tort actions, provided that at time of injury, damages are immediately ascertainable with relative certainty).

[37] Transcript, *CNN: Paula Jones Interview* (CNN television broadcast, June 27, 1994) (C.A. App. 85).

B. At A Minimum, The District Court's Decision To Stay Trial Should Have Been Sustained.

1. The Court Of Appeals Lacked Jurisdiction Over Respondent's Cross Appeal.

Respondent cross-appealed below to challenge the district court's order to stay trial. A district court's decision to stay proceedings, however, is ordinarily not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). While such orders may in some circumstances be reviewed on an interlocutory basis by way of writ of mandamus (*see* 28 U.S.C. § 651 (1994)), respondent never sought such a writ.[38]

Respondent instead asserted that the court of appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. The panel majority agreed, even though this Court recently ruled that "pendent appellate jurisdiction" should not be used "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995).

Swint exhibits strong skepticism toward the type of pendent jurisdiction exercised in this case. There, the Court explained that under 28 U.S.C § 1292(b), Congress gave a district court "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable," thus

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[38] Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." *See, e.g., Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, spondent did not assert this ground as a basis for jurisdiction, perhaps in recognition that it clearly is not applicable here, where the district court's order contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

> confer[ring] on district courts first line discretion to allow interlocutory appeals. If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.

115 S. Ct. at 1210 (footnote omitted). Notwithstanding this language, and without any certification of the issue by the district court, the Eighth Circuit asserted pendent appellate jurisdiction over the respondent's interlocutory appeal of the stay of trial.[39]

The panel majority reasoned that *Swint* did not apply because respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4. *See Swint*, 115 S. Ct. at 1212. The issues in the two appeals were not, however, "inextricably intertwined." That these two appeals raise very distinct issues is evident from the distinct nature of the inquiries they generate. The issue of whether the President can defer litigation raises a question of law; the issue of whether a district court can stay litigation is a discretionary determination based on the facts of a particular case. While a district court's legal decisions are entitled to no special deference, its exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion. *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936).

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[39] Since *Swint*, numerous other circuit courts have eschewed asserting pendent jurisdiction in appeals such as this. *See Woods v. Smith*, 60 F.3d 1161, 1166 & n.29 (5th Cir. 1995), *cert denied*, 116 S. Ct. 880 (1996); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Garraghty v. Virginia*, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

The district court here, in deciding to postpone trial, invoked its discretionary powers over scheduling. Pet. App. 71 (citing FED. R. CIV. P. 40). The court then expressly based its decision on the particular circumstances of this case:

> This is not a case in which any necessity exists to rush to trial. . . . Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.
>
> The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court . . . . Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

As this passage makes clear, the district court's decision to stay trial rested upon the particular facts at hand, and review of that stay -- unlike review of its decision to reject the President's position that the entire case must be deferred as matter of law -- must address these particular facts. Accordingly, even if the concept of "pendent appellate jurisdiction" survived *Swint*, the two appeals here were not "inextricably intertwined," and the panel majority's exercise of such jurisdiction over the interlocutory appeal was erroneous.

2. The Court Of Appeals Erred In Reversing The District Court's Decision To Stay Trial In This Case.

The district court clearly had the authority to stay trial in this case. In *Landis*, Justice Cardozo wrote for this Court that

> the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

299 U.S. at 254-55. Indeed, the Court in *Landis* specifically stated that

> *[e]specially in cases of extraordinary public moment*, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.

Id. at 256 (emphasis added). Obviously, a trial here, which would require the heavy involvement of a sitting President, is a case of "extraordinary public moment."

The panel majority in this case showed none of the deference to the district court's determination required by *Landis*. Instead, it rejected the trial court's order with a single sentence: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. This sweeping and conclusory ruling hardly represents the careful weighing of particular facts and circumstances necessary to support a conclusion that the trial court abused its discretion.

The district court, by contrast, specifically assessed the case and appropriately concluded that trial here should not proceed. For all the reasons enumerated above, the trial court found that it simply would not be possible to try the case without enormous and extraordinary demands on the President's time, and that the respondent's interests would be substantially preserved notwithstanding the stay. Due to these case-specific factors, the district court correctly stayed trial until the President left office. That decision was not an abuse

of discretion and, if reviewed at all, should have been sustained.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed, and this litigation should be held in abeyance, in its entirety, until the President leaves office.

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QUESTIONS PRESENTED

This uncomplicated civil action for damages against petitioner, who is President of the United States, for acts committed before he became President, bears no possible relation to his official responsibilities. No showing was made in the district court that the lawsuit, or any aspect of it, would impair the functioning of the presidency. The court of appeals ordered the district court to refrain from "creating scheduling conflicts" for petitioner on remand. The following questions are presented:

1. Whether the court of appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his presidency, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond "the outer perimeter of [the President's] official responsibility," the limit for presidential immunity set forth in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

2. Whether the court of appeals erred in reversing the district court's grant to petitioner of what the district court termed a "limited or temporary immunity from trial," Pet. App. 68, for acts beyond the outer perimeter of his official responsibility.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a $6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Mrs. Jones (Miss Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Mrs. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite

number written on it. When Mrs. Jones wondered what the Governor wanted, Trooper Ferguson responded: "It's okay, we do this all the time for the Governor." Trooper Ferguson then escorted Mrs. Jones to the Governor's floor. Complaint ¶¶ 6-13.

Mrs. Jones, who had never met the Governor before, entered his suite at his invitation. Small talk followed. Mr. Clinton asked Mrs. Jones about her job. The Governor noted that David Harrington, his appointee who served as the director of Mrs. Jones's agency and her superior there, was his "good friend." The Governor then made a series of verbal and physical sexual advances toward Mrs. Jones, and undressed himself from the waist down. Horrified, Mrs. Jones moved away from Mr. Clinton and said, "Look, I've got to go." Pulling up his pants, Mr. Clinton said, "If you get in trouble for leaving work, have Dave [Harrington] call me immediately and I'll take care of it." As Mrs. Jones left, the Governor looked at her sternly and said: "You are smart. Let's keep this between ourselves." Visibly shaken and upset, Mrs. Jones resumed her post downstairs. In the following hours and days, she told her coworker, friends and relatives about what had happened. Mrs. Jones made no immediate official or public complaint because of fear for her job and for her relationship with her fiancé, and because she felt there was no one to whom she could complain since both her ultimate boss and the police were involved. She remained at her agency for the next twenty-one months, where she both feared and experienced job retaliation for her refusal to submit to Mr. Clinton's advances. In 1993, Mrs. Jones moved to California, and Mr. Clinton became President of the United States. Complaint ¶¶ 14-40, 48.

In January 1994, a widely publicized magazine article reported that, while he was Governor of Arkansas, Mr. Clinton regularly used his state police security detail to solicit women for sex with him. The article, apparently based upon the accounts of various Arkansas state troopers, reported that

an unidentified trooper (clearly Mr. Ferguson) told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and escorted her to Mr. Clinton's room at the Excelsior Hotel. The article reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Mrs. Jones was one of the many women who, according to the article, had consensual sexual relationships with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Mrs. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances and asked that Mr. Clinton acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Mrs. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, only four months after learning about the damaging magazine article, and after attempting unsuccessfully to obtain an acceptable statement by Mr. Clinton to settle the matter and to restore her reputation, Mrs. Jones filed suit against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

Mr. Ferguson's answer to complaint admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer

¶ 11. He disclaimed any "personal knowledge of what took place in the hotel room." *Id.* ¶ 14.

Mr. Clinton did not answer the complaint, but instead requested and obtained an order allowing him to defer a response pending a motion to dismiss on grounds of "presidential immunity." Pet App. 40. On August 10, 1994, he filed what he called a "Motion to Dismiss on Grounds of Presidential Immunity." *See* Pet. App. ii. Citing the same principal authorities he cites here, Mr. Clinton argued that "immunity for the duration of the President's tenure is constitutionally mandated in the instant case." Memorandum in Support of President Clinton's Motion To Dismiss on Grounds of Presidential Immunity 6, *Jones* v. *Clinton*, Civil Action No. LR-C-94-290 (E.D. Ark. filed Aug. 10, 1994). As the district court noted, Mr. Clinton's claim "that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office," is "a claim of absolute immunity." Pet. App. 55. Mr. Clinton argued that the complaint should be dismissed without prejudice to being refiled after he leaves the White House; in the alternative, he argued that the district court should stay the case until that time. Pet App. 55.

Mr. Clinton's motion was predicated simply upon his occupancy of the Office of President of the United States. He made no factual showing that any aspect of the pretrial or trial proceedings would hinder him from carrying out the duties of that Office.

The district court denied the substance of Mr. Clinton's motion on December 28, 1994. Pet. App. 54. Rejecting Mr. Clinton's immunity claim, the court denied the motion to dismiss, and observed that "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support . . . be found" for Mr. Clinton's claim that he has "immunity from civil causes of action arising prior to [his] assuming the office" of the presidency. Pet.

App. 68. The court found Mr. Clinton's contention to be "contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." Pet. App. 68. Nevertheless, in a self-contradictory holding that was apparently premised upon isolated language in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the district court granted Mr. Clinton what it called a "limited or temporary immunity from trial," Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief and properly managed, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton *and* Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be 1997 or 2001. Pet. App. 68-71. The court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Mrs. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the district court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74. Mr. Clinton asserted that appellate jurisdiction existed under the rule that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." Opening Brief of Appellant President William Jefferson Clinton 10, 23, *Jones* v. *Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995).

On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never*

been "any case in which any public official . . . has been granted any immunity from suit for his *unofficial* acts." Pet App. 7 (emphasis added). The court of appeals noted that this Court's decision in *Nixon* v. *Fitzgerald* recognized a presidential immunity that extended only to " 'acts within the 'outer perimeter' of [the President's] official responsibility,' " and that "unofficial acts" are "[b]y definition . . . not within the perimeter of the President's official responsibility at all, even the outer perimeter." Pet. App. 8-9 (quoting *Fitzgerald*, 457 U.S. at 756). The court concluded that *Fitzgerald*'s rationale—"that, without protection from civil liability for his *official* acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability"—is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 11 (emphasis added). The district court's denial of Mr. Clinton's motion to dismiss was accordingly affirmed.

The court of appeals reversed the district court's grant of a "limited or temporary immunity from trial" for the same reasons. While recognizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on its docket," Pet. App. 13 (footnote omitted), the court of appeals held that, to the extent the district court's ruling could be characterized as an attempt to exercise that discretion, it was an "abuse of discretion" because it was "the functional equivalent of a grant of temporary immunity to which . . . Mr. Clinton is not constitutionally entitled," *id.* at. 13 & n.9. The court of appeals stressed that the district court had considerable power to ensure that the litigation would not interfere with Mr. Clinton's official duties, and that the district court was to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," Pet. App. 13:

> We have every confidence that the District Court will exercise its [scheduling] discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .
>
> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .
>
> The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

Judge Beam, concurring, emphasized that Mr. Clinton had failed to point out *any* "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case

was "not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government." Pet. App. 22. He concluded:

> Mrs. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President and Mrs. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of the litigation with maximum consideration of the President's constitutional duties. . . .
>
> As I have attempted to stress, *nothing [in our decision] prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled.*

Pet. App. 23-25 (emphasis added).

SUMMARY OF ARGUMENT

Mr. Clinton asks for the recognition of an entirely unprecedented presidential immunity, a purely personal privilege against lawsuits that have nothing to do with official, presidential duties. Nothing in *Nixon* v. *Fitzgerald*, 457 U.S. 731

(1982), or in this Court's immunity case law, however, supports his theory. The essential rationale of official immunity is that the imposition of personal damages liability on public officials for official acts would cause them to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Id.* at 744-75 (citation omitted). As a consequence, presidential immunity was limited in *Fitzgerald* to "acts within the *'outer perimeter'* of [the President's] *official responsibility*," *id.* at 756 (emphasis added), and Chief Justice Burger's concurring opinion in that case made clear that Presidents "are *not* immune for acts outside official duties," *id.* at 759 (Burger, C.J., concurring). The claim that *Fitzgerald* supports protection for unofficial acts is based upon language taken out of context.

Mr. Clinton's other authorities do not support his immunity claim. The Framers did not intend to place the President above the law, and thus did not confer upon Presidents any personal privileges akin to those of a monarch who is sovereign in both person and office. Nor do *United States* v. *Burr*, 25 F. Cas. 30, 187 (C.C.D. Va. 1807) (Nos. 14,692d and 14,694), and *United States* v. *Nixon*, 418 U.S. 683 (1974), support immunity. They simply stand for the proposition that confidential and official presidential communications are presumptively protected by executive privilege, which may nonetheless be overcome upon a sufficient showing of need. Here, no official acts or confidential communications are involved, and no balancing of interests between privilege and need is required. This Court's cases, indeed, have always limited Presidential privileges to official communications and acts, and there is no reason to abandon that course here.

Nor is Mr. Clinton's immunity claim supported by separation-of-powers principles. He made no showing below that this case will actually prevent him from carrying out his duties. Nor could he, given the manifest simplicity of the case. Mr. Clinton is thus reduced to the contention that in general, litigation (including a hypothetical torrent of future

cases) will always interfere with Presidential duties. Mr. Clinton overstates the vulnerability of his Office's work to civil litigation involving unofficial actions. In addition, Mr. Clinton also overstates a supposed danger that a trial court, by engaging in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," as the court of appeals directed, Pet. App. 13, will somehow interfere with the functioning of the Executive Branch.

ARGUMENT

I. THE TEMPORARY PRESIDENTIAL IMMUNITY ASSERTED BY PETITIONER IS LEGALLY INSUPPORTABLE AND IS UNNECESSARY TO PROTECT THE INTERESTS OF THE PRESIDENCY.

A. The immunity case law does not support petitioner's immunity claim.

Mr. Clinton, the Government, and the academic *amici* supporting him ask this Court to create a heretofore unrecognized presidential immunity: a purely personal privilege against lawsuits that have nothing to do with official, presidential duties. They argue that, even in cases having nothing to do with official action of any kind, "private civil damages litigation against an incumbent president must, in all but the most exceptional cases, be deferred until the president leaves office." Pet. Br. 11. And while Mr. Clinton now shies away from using the word "immunity" to describe the relief he seeks, the academic *amici* supporting him candidly do not. As they explain, the gist of Mr. Clinton's claim is that "*Nixon* v. *Fitzgerald* supports a temporary Presidential immunity for civil litigation even for claims based on private conduct." Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 11. Mr. Clinton and his *amici* indeed rely principally upon the leading presidential immunity case, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which, they say, recognizes that, regardless of the

basis of the claim, "one [cannot] hale an incumbent President into court and seek damages from him personally," Pet. Br. 17, and "indicates that the instant suit should be deferred," Br. for United States as *Amicus Curiae* 4. Neither the *Fitzgerald* holding nor its rationale, however, supports the extraordinary and novel immunity claim advanced here.

In *Fitzgerald*, a five-Justice majority of this Court held that Presidents are entitled to an absolute immunity for suits for civil damages relating to any of their official acts. Four Justices dissented, arguing that presidential immunity should be limited only to particular functions performed by the President. Both the majority and concurring opinions made clear that the President's official immunity only forecloses "damages liability for acts within the *'outer perimeter'* of [the President's] *official responsibility*." *Fitzgerald*, 457 U.S. at 756 (emphasis added). Chief Justice Burger explained that presidential immunity covers only *official* actions and "*does not extend beyond such actions*"—that "a President, like Members of Congress, judges, prosecutors or congressional aides . . . [is] *not* immune for acts outside official duties." *Id.* at 761 n.4, 759 (Burger, C.J., concurring; emphasis added). That very limitation, Chief Justice Burger observed, was precisely why the Court's decision did not "place[ ] a President 'above the law,' " as the dissent had vigorously argued. *Id.* (Burger, C.J., concurring); *see id.* at 766-67 (White, J., dissenting); *id.* at 797 (Blackmun, J., dissenting).

The limitation of immunity to official acts is backed by a long and unbroken line of authority cited in *Fitzgerald*. As Judge Learned Hand once explained, "[t]he decisions have, indeed, *always* imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (emphasis added), *cert. denied*, 339 U.S. 949 (1950). The essential rationale of immunity is that imposing personal liability for *official* acts would distort official judgment or make officials unwilling to act. Thus, *Fitzgerald* observed that,

"[i]n the absence of immunity, . . . executive officials would hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action." *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 499 (1896)). The Court cited "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties" as being "[a]mong the most persuasive reasons supporting official immunity." *Id.* at 752 n.32. Immunity, the Court explained, was necessary to "provid[e] an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)).[1]

In following this central rationale undergirding this Court's immunity cases, *Fitzgerald* held that official immunity could only be invoked as a defense in litigation involving official acts:

> Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his *official* acts.
>
> * * *
>
> In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts *within the 'outer perimeter' of his official responsibility.*

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[1] *See also, e.g., Mireles* v. *Waco*, 502 U.S. 9, 10-11 (1991) (per curiam) (judges immune for judicial acts so that they may act in official capacity without apprehension of personal liability); *Forrester* v. *White*, 484 U.S. 219, 226-29 (1988) (same); *Butz* v. *Economou*, 438 U.S. 478, 504-17 (1978) (same for executive agency officials); *Imbler* v. *Pachtman*, 424 U.S. 409, 424-31 (1976) (state prosecutors); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240-49 (1974) (state executive officials); *Tenney* v. *Brandhove*, 341 U.S. 368, 376-79 (1951) (state legislators); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347-53 (1872) (judges).

Id. at 749, 756 (emphasis added). These words were not mere dicta. Sharply disputed in *Fitzgerald* was the issue of which acts were to be subject to immunity. The Court noted that, in the past, it had linked absolute immunity to particular official functions: "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Id.* at 755. But because of the variety of functions performed by the President, the Court selected the broadest scope of absolute immunity recognized in the case law: immunity "for acts within the 'outer perimeter' of . . . official responsibility." *Id.* at 756; *see, e.g., Spalding* v. *Vilas*, *supra*, 161 U.S. at 498; *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959). The Court then applied its holding to the facts of the case. Citing a specific provision of the United States Code, it held that the alleged conduct for which President Nixon had been sued indeed fell within the outer perimeter of presidential responsibility. *Id.* at 757.

Conceding, as he must, that "[t]his case is different from *Fitzgerald* . . . in that it largely does not touch upon official actions," Mr. Clinton nevertheless contends that "[t]he logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here—the temporary deferral of private civil litigation." Pet. Br. 20. In support of this argument, Mr. Clinton points to two sentences in a single paragraph of *Fitzgerald*: one sentence stating that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government"; and another stating that "the sheer prominence of the President's office [cannot] be ignored." *Fitzgerald*, *supra*, 457 U.S. at 751-53, *quoted in* Pet. Br. 20. This language, the argument goes, applies as fully to lawsuits involving private conduct as to those involving official conduct, and so requires recognition of the temporary immunity sought here. *See* Pet. Br. 20-21; *sce also* Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 10; Br. for United States 16.

Mr. Clinton misreads *Fitzgerald* because, as even the Government admits, "[w]hen the President is sued for actions wholly unrelated to his official responsibilities, *Fitzgerald*'s concern for ensuring 'fearless[ ] and impartial[ ]' Presidential decision making is not directly implicated." Br. for United States 15. The language upon which Mr. Clinton relies simply cannot be stripped from the context of that concern. Indeed, it comes from the Court's explanation of why the absolute immunity given to "prosecutors and judges," rather than the qualified immunity given to "governors and cabinet officers," was appropriate for the President's official actions, *Fitzgerald*, 457 U.S. at 750-51; and it makes clear that the "unique risks to the effective functioning of government" to which the Court referred stemmed from private lawsuits concerning *official* acts. The Court said that the overriding policy consideration underlying official immunity—that lawsuits over official acts might compromise an official's " 'ability to deal fearlessly and impartially with' the duties of his office," 457 U.S. at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979))—applied with greater force to the President because (1) the President's official acts were more likely to be controversial ones affecting "countless people" than those of other officials, and (2) the President's "sheer prominence" made him the most likely target for suits about controversial official acts of the Executive Branch. Thus, the relevant portion of the Court's opinion reads as follows:

> In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E.g.*, *Butz* v. *Economou*, 438 U.S. 478 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other officials.
>
> Because of the singular importance of the President's duties, diversion of his energies by concern with private

> lawsuits would raise unique risks to the effective functioning of government. *As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." Pierson* v. *Ray*, 386 U.S., at 554. *Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979). *This concern* is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the presidency was designed to serve.

457 U.S. at 751-53 (footnotes omitted; emphasis added). In short, the Court reasoned that the President was potentially more vulnerable than other officials to lawsuits for *official* acts, and that absolute, not qualified, immunity should therefore apply to those acts.

The Court's reasoning in *Fitzgerald* thus has no application to the case at bar. As the court of appeals concluded, "[i]t is clear from a careful reading of *Fitzgerald*" that this Court was "concern[ed] that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process," and might cause the President to "make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid

lawsuits and personal liability." Pet. App. 11. No such dangers arise, of course, from suits relating to personal conduct. Imposing liability for pre-presidential or other unofficial conduct will simply not cause Presidents to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding* v. *Vilas*, 161 U.S. at 499). It will not diminish a President's " 'ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). It will not place the President " 'under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.' " *Id.* at 745 (quoting *Spalding*, 161 U.S. at 498). And it will not require any court "to probe into the elements of Presidential decisionmaking," or to engage in "judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information." *Id.* at 761-62 (Burger, C.J., concurring).

B. Petitioner's immunity claim would be contrary to the intention of the Framers, is not supported by any decisions of this Court, and would place petitioner above the law.

Mr. Clinton also contends that allowing this litigation to proceed would run contrary to the "teaching of the Framers," Pet. Br. 15, and would contravene both "historical doctrine" and "traditional practice," *id.* at 17. To the contrary, the Framers did not intend to place the President above the law, and did not invest the President with any personal privileges akin to those of the English King. As the district court wrote, "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any support . . . be found" for giving the President special protection from "civil causes of action arising prior to assuming the office." Pet App. 68. Mr. Clinton's claim is simply "contrary to our form

of government." *Id.* Indeed, to the extent that there is any "traditional practice" on the point at all, it is that lawsuits involving a President's unofficial acts must be allowed to proceed.

The Framers believed that every constitutional power and every constitutional actor must be constrained. "Federalists and antifederalists both agreed . . . that no one should ever be entrusted with unqualified authority." Bernard Bailyn, *The Ideological Origins of the American Revolution* 368 (1992). Having fought to escape the reign of a king whose power was unchecked, they were certain "that any release of the constraints on the executive—any executive—was an invitation to disaster." *Id.* at 379 (citing remarks of Edward Rutledge); *see also* 4 Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention of Philadelphia in 1787* 276 (2d ed., reprinted 1987).

As a result, the Framers adhered to a notion reflected time and again in this Court's decisions: "No man in this country is so high that he is above the law." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). It was understood that the President had no personal privileges beyond those of an ordinary citizen:

> *His person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law.*

An American Citizen (Tench Coxe) I, Independent Gazetteer (Philadelphia) September 26, 1787, reprinted in I Bernard Bailyn, ed., *The Debate on the Constitution* 20, 24 (1993) (emphasis in original). As Charles Coatsworth Pinckney, an important Framer, explained on the Senate floor only a few years after the Constitution's adoption, the Framers

> well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.

Annals of Congress, March 5, 1800, at 72. Pinckney continued:

> let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? . . . The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

Id. at 74; *cf. Nixon* v. *Fitzgerald*, *supra*, 457 U.S. at 755 (immunity must be "closely related to [its] justifying purpose," and "the sphere of protected action must be related closely to the immunity's justifying purpose"). Similarly, James Wilson explained that the President

> is placed high, and is possessed of power far from being contemptible; *yet not a single privilege is annexed to his character*; far from being above the laws, *he is amenable to them in his private character as a citizen*, and in his public character by impeachment.

2 Elliot, *Debates on the Federal Constitution*, *supra*, at 480 (emphasis added and omitted).

Mr. Clinton's own description of the historical record only serves to confirm the district court's conclusion that he has no credible support for his claim. As he did below, Mr. Clinton relies primarily upon Justice Story's isolated statement that a President's "person must be deemed, in civil cases at least, to possess an official inviolability." Pet. Br. 16 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563, pp. 418-19 (1st ed. 1833)). By its terms, however, Justice Story's statement referred only to the President's

"*official* inviolability," and described only the protections for actions taken by a President "*while he is in the discharge of the duties of his office*," *id.* (citation omitted), and thus goes no farther than *Nixon* v. *Fitzgerald*, which did not recognize any "immun[ity] for acts *outside* official duties," *Fitzgerald*, 457 U.S. at 759 (Burger, C.J., concurring). Beyond this, Justice Story was referring only to a presidential privilege from "arrest, imprisonment, or detention"—none of which, of course, is involved here—and the "official inviolability" he described was only for "*this* purpose." Pet Br. 16 (citation omitted; emphasis added).[2] And as for Mr. Clinton's citation of Presidents Adams and Jefferson to the effect that "the President personally is not subject to any process whatsoever," Pet. Br. 16, that view was refuted by Chief Justice Marshall early in our Nation's history in *United States* v. *Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) ("That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted"). *See also Nixon* v. *Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc; per curiam) (noting that Chief Justice Marshall "squarely ruled that a subpoena may be directed to the President).[3] It is thus now

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[2] An ordinary modern civil case, of course, presents no danger of arrest, imprisonment or detention of the defendant. Accordingly, the debate over whether a "President must be impeached and removed from office before he can be prosecuted" for a crime, Pet. Br. 14-15 & n.11; *see also* Br. for United States 15 n.8, is irrelevant here.

[3] In fact, the Jefferson letter that Mr. Clinton quotes was one in which President Jefferson was expressing his criticisms of the Chief Justice's decision in *Burr*. *See Fitzgerald*, 457 U.S. at 751 n.31; *see also* Bradford E. Biegon, Note, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's* Commentaries, 82 Va. L. Rev. 677, 698 & nn.127-28 (1996) ("Jefferson's close of the letter is illustrative of the distemper that Marshall's opinion must have caused him").

As for President Adams, he is almost universally regarded as an exponent of an excessively expansive view of executive power. He was regarded by most of his contemporaries as being almost a monarchist. *See*

"settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President." *Nixon* v. *Fitzgerald*, 457 U.S. at 753-54.

The law ever since Chief Justice Marshall's pronouncement in *Burr*, *supra*, supports not a distinction between testimony in criminal and testimony in civil cases, as Mr. Clinton contends (*see*, *e.g.*, Pet. Br. 17, 26-27), but a line between matters that pertain to the President's official duties and those that do not—in other words, precisely the line followed in *Fitzgerald*. Thus, in *Burr*, Chief Justice Marshall observed that the President was "subject to the general rules which apply to others," and recognized *only* a privilege "to withhold private letters . . . written . . . in consequence of [the President's] public character, and may relate to public concerns." *Burr*, 25 F. Cas. at 191-92. Similarly today, the threshold issue of whether there is a presidential privilege turns not upon whether a proceeding is civil or criminal, but upon the nature of the materials subpoenaed. When faced with a subpoena, a President may "legitimately assert privilege, of course, *only* to those materials whose contents fall within the scope of the privilege recognized in *United States* v. *Nixon*"—which is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping and making decisions.' " *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 449 (1977) (quoting *United States* v. *Nixon*, 418 U.S. 683, 711, 713, 708 (1974)). Only if that stringent test is met is there a "presumptive privilege." *United States* v. *Nixon*, 418 U.S. at 708. But even this presumptive privilege may be overcome, since the interests of the Executive Branch must be balanced against "our historic commitment to the rule of law," which "depend[s] on full disclosure of all the facts, within the framework of the rules evidence." *Id.* at 709. Only when that balancing is required—where *official* acts and communications are at issue—does it

W. Page Smith, *John Adams* 755 (1962); *see also* Biegon, *supra*, 82 Va. L. Rev. at 696.

become relevant whether a judicial proceeding is civil or criminal in nature. *See id.* at 707-13.

Thus, the executive privilege recognized by this Court in *United States* v. *Nixon* in no way supports Mr. Clinton's argument. Executive privilege is analogous to the protection recognized in *Nixon* v. *Fitzgerald*, and its limitations are similar. Both protections are designed to preserve the presidential decision-making process, and both are narrowly crafted to achieve that end. Executive privilege is necessary because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States* v. *Nixon*, 418 U.S. at 708. Because official conduct and communications are not involved here, there is no warrant to engage in the balancing of interests required in *United States* v. *Nixon*, and no basis to hold that there must be Sixth Amendment interests at stake for this litigation to proceed.[4] This case would no more threaten "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," *id.*, than it would threaten to cause Presidents "to hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' " *Nixon* v.

[4] Mr. Clinton is accordingly wrong to suggest that *United States* v. *Nixon* can be read as implying that the testimony of someone serving as President cannot be compelled in "civil proceedings." Pet. Br. 27. The Court simply left open the question whether the presumptive *executive privilege* for executive communications could be overcome in civil proceedings. *See Nixon*, 418 U.S. at 711-12 & n. 19. Here, of course, there is no question of privilege, and therefore no need to look to whether the need to produce evidence in a civil case may be overcome by the need to protect the privacy of official presidential deliberations. Similarly, Mr. Clinton's observation that the Court in *Nixon* twice quoted Chief Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual," Pet. Br. 27 (quoting *Nixon*, 418 U.S. at 708, 715 (quoting *Burr*, 25 F. Cas. at 192)) is beside the point: both Chief Justice Marshall in *Burr* and the *Nixon* Court were addressing the question of how claims of executive privilege must be handled by the courts.

Fitzgerald, 457 U.S. at 744-75 (quoting *Spalding* v. *Vilas*, 161 U.S. at 498-99).

This Court has recognized the distinction between official and unofficial acts when determining the President's amenability to suit in contexts other than civil damages actions as well. The judiciary "has no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866); the courts "cannot direct the President to take a specified executive act," *Franklin* v. *Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part and in judgment). This rule serves the same functions as the immunity recognized in *Fitzgerald*, *see Franklin*, 505 U.S. at 827-28 (Scalia, J., concurring in part and in judgment), and is likewise expressly limited to official acts. Indeed, in *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) at 501, "the bill contain[ed] a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee." In responding to this contention, the Court did not dispute that injunctive proceedings could be had against a citizen serving as President. Rather, the Court held that what was prohibited was "relief *as against the execution of an Act of Congress* by Andrew Johnson"—an injunction relating to the President's *official* acts. *Johnson*, 71 U.S. (4 Wall.) at 501 (emphasis added).

Finally, there is no support for Mr. Clinton's claim that the paucity of cases against Presidents for unofficial acts is due to a "nearly universal understanding that such litigation is inconsistent with our constitutional scheme." Pet. Br. 18. There has been no such understanding. None of the prior Presidents who were sued for nonpresidential acts (Presidents Theodore Roosevelt, Harry Truman, and John Kennedy) asserted any immunity claim. Pet. App. 14 n.10.[5] And President Nixon *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States* v. *Nixon*, *supra*, and then later, in his briefs in *Nixon* v. *Fitzgerald*, *supra*.[6] In any event, the understanding reflected in Mr. Clinton's brief is that such litigation may indeed be brought, but must be stayed. If *that* were the universal historical understanding, then plaintiffs with claims against Presidents for unofficial acts would not have withheld their claims, but would have *asserted* them to preserve their timeliness, even if the claims were going to be stayed.

In short, to create a blanket rule protecting a President from litigation relating to his unofficial acts would cross a line that this Court has never crossed and that the Framers never contemplated would be crossed. It would create the first purely personal presidential privilege. It would provide, as the court of appeals noted, a "degree of protection from suit for

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[5] President Kennedy attempted to obtain a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), Pet. App. 14 n. 10, but the state trial court denied his motion, which was plainly meritless in light of this Court's decision in *Boone* v. *Lightner*, 319 U.S. 561 (1943).

[6] At oral argument in *United States* v. *Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

> QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?
>
> MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument at 80, *United States* v. *Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon at 8-9 n.6, *Nixon* v. *Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

his private wrongs enjoyed by no other public official (much less ordinary citizens)." Pet. App. 13. It would violate the precept that "[n]o man in this country is so high that he is above the law," *United States* v. *Lee*, *supra*, 106 U.S. at 220, or, as President Theodore Roosevelt said, that "[n]o man is above the law, and no man is below it; nor do we ask any man's permission when we require him to obey it."[7]

This is so even though the relief sought here is termed a "temporary deferral," Pet. App. 13, as opposed to dismissal. For far from being a brief delay, Mr. Clinton's requested "deferral" may be very long indeed. This action was commenced in 1994, and discovery is currently stayed by order of the District Court, Pet. App. 74. If Mr. Clinton is reelected, and if his temporary immunity claim is upheld, *discovery* would not even begin until early 2001—almost *seven years* after the claim was first brought. As for a claim more complex than Mrs. Jones's that is brought at the beginning of a two-term President's service in office, it is likely that more than a *decade* (and possibly more) would pass before the claim is tried, and perhaps more than *dozen* years would pass before any judgment became final on appeal.

Even in an age of heavy dockets, delays of such length are extraordinary, and by any standard exceed the "bounds of moderation," *Landis* v. *North American Co.*, 299 U.S. 248 (1936); indeed, as any unbiased litigator would attest, they are a defendant's dream. For under Mr. Clinton's proposed scheme of "deferral," a President may, in his capacity as an ordinary citizen, fail to meet a contractual covenant, or to pay a debt; he may commit a battery or a trespass or other tort, or commit any type of civil violation of law; and yet, unlike any other citizen, for a period of possibly eight years or even more, he is privileged not to pay any judgment, to submit to

[7] John Bartlett, *Familiar Quotations* 687 (15th ed. 1980). With more spice as an apt egalitarian principle, is Montaigne's aphorism that "on the highest throne in the world, we still sit only on our own bottom." *Id.* at 166.

a trial, to give a deposition, to produce any document, or even to admit or to deny any of the allegations of a complaint. During this period of many years, evidence inevitably will be lost, as witnesses become unavailable, memories fade, and documents are mislaid or destroyed, all to the likely detriment of the plaintiff, who still must bear the burden of proof. If such delay were commanded by law, a plaintiff might be wise not to bother to assert even the strongest of claims. And in a case such as this, where the plaintiff seeks vindication for damage to her reputation, no amount of prejudgment interest will compensate for any delay. The presumptive "deferral" rule sought by Mr. Clinton is indeed a special privilege or "immunity"—which is why Mr. Clinton repeatedly described it as such throughout the proceedings below.

Mr. Clinton's description of stays in other litigation contexts only serves to confirm the extraordinary nature of the privilege he seeks here. With one execption—the stay provision in the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993) (Pet. Br. 36)—each of the examples of stays he cites are ones required in order to allow *other* judicial or administrative cases to proceed. And none of these examples involves the creation of a special, personal privilege. Thus, the automatic bankruptcy stay (Pet Br. 34-35), which is the product of a statute, 11 U.S.C. § 362 (1994), serves to allow claims to be immediately addressed in the bankruptcy forum; and it affords protection not only to debtor-defendants but to claimant-plaintiffs, by preserving the value of the bankrupt estate. And as for the protection afforded debtors, it is available to any person who may file a bankrupcy petition—and not to a special privileged class of one. Similarly, the stay of civil litigation in favor of criminal litigation (Pet. Br. 35) serves the interests of justice, judicial economy, and constitutional rights such as the privilege against self-incrimination, and, through the doctrines of res judicata or collateral estoppel, may even benefit the civil plaintiff. And facilitating the conduct of criminal litigation

against the defendant hardly amounts to a privilege for the defendant. The doctrine of primary jurisdiction (*id.* at 36) likewise serves the interests of economy, and does not place any citizen above any other in the eyes of the law. Finally, a stay of proceedings pending appeal (*id.*), like that entered here, is hardly unique to official-immunity litigation; it serves to preserve an issue for appellate review and creates no privilege for anyone.

As for the Soldiers and Sailors' Civil Relief Act, its stay procedure was expressly created by Congress, which could have just as easily granted relief to Presidents, but has not. In any event, as this Court has held, stays under that Act are not to be liberally granted; for example, "[t]he Act cannot be construed to require continuance on [a] mere showing that the defendant was in Washington in the military service," *Boone v. Lightner*, 319 U.S. 561, 565 (1943), and thus could not help Mr. Clinton even if the Act's military-service requirement could be ignored. Unlike the examples he cites, the relief Mr. Clinton seeks is indeed extraordinary, and would unquestionably provide a "degree of protection from suit for . . . private wrongs enjoyed by no other public official (much less ordinary citizens)." Pet. App. 13. Indeed, as the example of the Soldiers and Sailors' Civil Relief Act shows, any such protection should not be for the courts to create, but for Congress to enact.

C. Petitioner's claim of temporal immunity cannot be justified under Article II or the separation of powers.

Mr. Clinton and *amici* also contend that Article II and separation-of-powers principles establish the temporary immunity from suit that he seeks. To make out a separation-of-powers violation under this Court's cases, however, Mr. Clinton must demonstrate how proceeding with this litigation would cause the "encroachment or aggrandizement of one branch at the expense of the other,' " *Metropolitan*

Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)), or would otherwise "prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). Mr. Clinton's burden of showing a separation-of-powers violation, or showing that a stay of all proceedings is otherwise justified, is unmet. Nor is a blanket temporary-immunity protection required in *every* personal action against the President as a matter of law.

1. This simple civil case will not prevent the Executive Branch from accomplishing its constitutionally assigned functions.

As the court of appeals observed, Mr. Clinton has presented a "sweeping claim that this suit . . . will violate the constitutional separation of powers doctrine . . . without detailing any specific responsibilities so explaining how or the degree to which they are affected by the suit." Pet. App. 12. He made no attempt in the district court to show how this case could possibly keep him from carrying out his official duties. He did not do so for a very simple reason—he cannot.

It is not even necessary to look to Mr. Clinton's duties to establish the point. Given its simple factual predicate and the utterly barren record, this case could not be deemed to impose hardship upon the Executive Branch. It has nothing to do with Mr. Clinton's official duties. It is at bottom a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably he has already spent with his counsel the short time required to obtain his recollection of events, for according to what he has publicly said, his recollection is nonexistent. By its nature, the case will not require the production of many

documents. Discovery and trial in this case will not be burdensome, and can be controlled by the ample powers of the district court to prevent any interference with Mr. Clinton's official duties. On the other hand, the dimming of memories and the risk that other evidence may be lost could prove fatal to corroboration of Mrs. Jones's claims, and possibly to the case itself.

In his brief, Mr. Clinton cites television reports describing "[r]espondent's counsel's . . . intention to pursue discovery aggressively." Pet. Br. 21. Even aggressive discovery, however, would not make this case very complex—as *Mr. Clinton's* own counsel has publicly acknowledged. Mr. Clinton's counsel has admitted that "[t]he President's case is not a complicated case," and has explained that "[i]f the President were Joe Schmo [*sic*], we wouldn't be wasting time with motions. I'd go to trial next week . . . ."[8] He has also publicly acknowledged that the trial in this case would be very short.[9] In short, of the sorts of lawsuits that one could imagine being brought against any individual, this one is just about the simplest—even in the view of Mr. Clinton's own counsel. But the Court certainly need not rely upon the press clippings offered by the parties to decide whether the case is really that simple. The allegations of the complaint bespeak their own factual simplicity, and Mr. Clinton can point to nothing in the record suggesting that this case cannot be quickly and easily tried.

Mr. Clinton has thus offered no case-specific facts to show that *this case* would actually be so burdensome that it would impair his ability to carry out his official duties. Instead, he and his *amici* devote most of their efforts to establishing—generally, and not with reference to *this* simple case—that his duties are so vast and litigation over personal matters so

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[8] Ruth Shalit, *The President's Lawyer*, N.Y. Times, Oct. 2, 1994, § 6, at 42, 47 (quoting Robert S. Bennett, Esq.).

[9] Frank Deford, *The Fabulous Bennett Boys*, Vanity Fair, August 1994, at 80, 85.

potentially burdensome that the two are bound to conflict, and a blanket rule requiring a stay is called for.

These arguments fail. The Chief Executive's duties are difficult and important, but the fact remains that they are, as Chief Justice John Marshall once observed, "not unremitting," and do not "demand his whole time for national objects." *United States* v. *Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692d). That is no doubt because, as common sense makes clear, a President does not and cannot exercise all executive power himself; unlike legislative or judicial powers, executive powers can be, and for the most part, are, delegated. "Although the Constitution says that '[t]he executive Power shall be vested in a President of the United States of America,' Art. II, it was never thought that the President would have to exercise that power *personally*. He may generally authorize others to exercise executive powers, with full effect of law, in his place." *Mistretta* v. *United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) (emphasis in original). The President's powers are mostly exercised through others. As a result, Presidents have always had time to fulfill personal commitments that do not involve the exercise of their Article II powers. Mr. Clinton's activities in the weeks after his brief was filed, which are a matter of public record, provide an apt example: a book that Mr. Clinton had authored was published; he spent a week vacationing in Wyoming, where he hiked and played golf; he spent a day in New York to attend a large birthday party in his honor; he spent four days riding a train through the Midwest; attended a political convention in Chicago; went on a two-day bus trip through another route in the Midwest and South; and spent a day in Little Rock, where he played golf.[10] There is, of

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[10] *E.g.*, *Clinton's Book Reinforces Administration's Themes*, Wash. Post, Aug. 22, 1996, at A8, col. 1; *Clinton Puts Off Politics As Vacation Winds Down*, Wash. Post, Aug. 17, 1996, at A15, col. 1; Alison Mitchell, *Clinton Has $10 Million Wish for Birthday Bash*, N.Y. Times, Aug. 19, 1996, at A1, col. 4; John F. Harris, *President Finds 'Heaven' on the Campaign Rails*, Wash. Post, Aug. 27, 1996, at A1, col. 3; Dan Balz, *Despite*

course, absolutely nothing inappropriate with any of these activities, because the business of the Executive Branch indisputably went on unimpaired. But they refute the claim that the demands of this "civil damages litigation against a sitting President would seriously impair the President's ability to discharge his constitutional responsibilities." Pet. Br. 20.

The past experience of Presidents with judicial and other legal proceedings likewise refutes Mr. Clinton's argument. Presidents have given evidence under judicial supervision even as to matters relating to their office, without any ill effect.[11] Mr. Clinton's own experience with the Whitewater affair by itself proves the point: In addition to giving grand jury testimony by videotape on more than one occasion, Mr. Clinton has given testimony by videotape in two separate criminal trials in the district court, which successfully and uncontroversially balanced his schedule with the rights of the litigants and the evidentiary needs of the case.[12] Indeed, given

Key Strategist's Fall, President Says 'Hope Is Back', Wash. Post, Aug. 30, 1996, at A1, col. 5; Todd S. Purdum, *Campaigns Over, the Candidates Take To the Road*, N.Y. Times, Aug. 31, 1996, at A1, col. 6; Todd S. Purdum, *Clinton Starts at the Beginning Once Again*, N.Y. Times, Sept. 2, 1996, § 1, p. 10, col. 1.

11 *E.g.*, *United States* v. *Fromme*, 405 F. Supp. 578, 582-83 (E.D. Cal. 1975); *see also United States* v. *Poindexter*, 732 F. Supp. 142, 143-146, 149-160 (D.D.C. 1990); 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 7.1 (2d ed. 1992); Laurence H. Tribe, *American Constitutional Law* 78 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

12 *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark.); *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.); *see, e.g.*, Stephen Labaton, *Clinton Denies Any Link to Whitewater Case Loan*, N.Y. Times, May 10, 1996, § A, p. 1, col. 1; Alison Mitchell, *Clinton Is Ordered To Testify in Ex-Partners' Fraud Trial*, N.Y. Times, Feb. 6, 1996, § A, p. 16, col. 5; Ronald Smothers, *Judge Rules Clinton Testimony Will Be Videotaped for Trial*, N.Y. Times, Mar. 21, 1996, § A, p. 16, col. 1; Hugh Aynesworth, *Clinton Deposition Could Take 8 Hours, Judge Tells Lawyers*, Wash. Times, Apr. 18, 1996, part A, p. 18; Tim

the fact that they were indeed criminal proceedings, that Mr. Clinton is expressly a principal subject of the Independent Counsel's criminal investigation into Whitewater,[13] and given that this investigation encompasses a number of complex and disparate financial transactions, Mr. Clinton has surely already spent more time dea'ing with Whitewater than he ever will with this case. At the least, it is clear that he has had to do in the criminal realm the burdensome things he now claims he cannot do in any civil litigation against him: "to review [pleadings]; prepare and assure the veracity of discovery responses; retrieve and review documents; . . . review . . . other evidence in the case; review the opposition's pleadings and motions; . . . consult with counsel throughout the case"—and testify. Pet. Br. 23; *see also* Br. for United States 9. If the Independent Counsel's investigation has not kept Mr. Clinton from his official duties, neither will most personal civil cases—and *certainly* not *this* one.

The very trial judge who will try this case, indeed, was very solicitous of Mr. Clinton in one of the Whitewater trials,[14] and even came to Washington to moderate his videotaped deposition in that case. She also granted his request that the tape not be shown to third parties. Far from intruding into presidential business, she has managed litigation to prevent judicial intrusion. She would no doubt be very accomodating of Mr. Clinton's scheduling concerns in this case through the use of her case-management experience (and through *in camera* and *ex parte* conferences when needed), and could ensure that no presidential business would be impaired. And she would no doubt be highly cognizant of the public mistrust of

Weiner, *Clinton Testifies on Tape in Trial of Bankers*, N.Y. Times, July 8, 1996, § A, p. 11, col. 1.

13 Order, *In re Madison Guaranty Savs. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir., Sp. Div. Aug. 5, 1994) (appointing Independent Counsel).

14 *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.).

the justice system that would result if the President were not treated fairly in the conduct of litigation while he is President.

Only by *ipse dixit* does Mr. Clinton assert that, "if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events." Pet. Br. 23. As the court of appeals correctly noted, however, Mr. Clinton's assertion about a flood of future cases is "not only speculative, but historically unsupported." In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." Pet App. 14 n.10; *see also* Br. for United States 6-7 n.4. The historical record reveals no presidential hardship caused by these cases. *Id.*[15]

The reason why there have been so few cases is precisely that identified in the opinion of the court of appeals. Very few people actually "traffic with the President in his *personal* capacity," Pet. App. 15, leaving even fewer who could have any conceivably colorable claim. It is fanciful to suggest that Presidents, who have absolute immunity from damages for their official acts under *Nixon* v. *Fitzgerald*, are "especially vulnerable to politically motivated 'strike suits' " for their unofficial acts. Pet. Br. 23. Even apart from the fact that plaintiffs would be few and far between, it is highly unlikely that political partisans would make litigation their attack vehicle of choice. As the Nation's political history shows, litigation is hardly necessary to accuse, attack, or embarrass a public figure. Indeed, if accusations against a public figure

[15] The lawsuit against President Truman, in particular, was filed just a few months before he became President, and was actively litigated during his term of office. Biegon, *Presidential Immunity*, *supra*, 82 Va. L. Rev. at 711-12. But "[d]espite the enormous demands of the Presidency during this tumultuous period in history, Mr. Truman did not find it necessary to seek the tolling of Mr. DeVault's suit." *Id.*; *see DeVault* v. *Truman*, 194 S.W.2d 29 (Mo. 1946).

are unjustified or purely partisan, one would think that litigation—which gives the public figure access to discovery and to a neutral forum in which to obtain vindication—is the *least* likely mode of attack. Mrs. Jones, for example, has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a neutral, nonpartisan forum empowered not only to dismiss her claims, but to impose severe sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including purely private ones against Presidents.

Further, Mrs. Jones's life as a plaintiff is not attractive. She is subject to scurrilous comments in the media and minute examination of her past, is living in a controlled environment to prevent unwanted intrusion, and is exposed to intense interest and comments whenever she is recognized in public by all manner of people. It takes a person with great courage to sue someone with more influence, wealth, privilege, and power. If anything, Mrs. Jones's experiences would discourage others from ever suing a sitting President, especially since her case has now been delayed for more than two years.[16]

[16] To compound matters, a supposed delay in filing her claim is claimed by Mr. Clinton to suggest that Mrs. Jones's motives were bad. Pet. Br. 41-42. If a political strike suit was her desire, the presidential campaign of 1992 would have been the time to attempt to politically harm Mr. Clinton. The possibility that Mrs. Jones had no such motive, as proven by her lack of desire to sue for almost three years until she was libeled, does not suggest itself to Mr. Clinton, who can see no harm in any post-filing delay to Mrs. Jones's cause in quickly restoring her reputation.

An improper motive is also implied by Mr. Clinton when he notes that Mrs. Jones did not sue the publication that published the libel. Pet. Br. 3 n.1. But the standard of proving libel in the face of the First Amendment rights of the press is difficult.

2. Proper judicial case management is sufficient to protect the interests of the Executive Branch in this case and would not violate the separation of powers.

None of this is to say that the courts do not owe great deference to the presidency in overseeing litigation. What is needed in *this* case to protect the public's interest in the presidency, however, is exactly what the court of appeals prescribed. Emphasizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on its docket," the court of appeals directed the district court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. The district court was directed to "exercise its discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties." *Id.* at 13-14.

The decision below recognizes that a stay, not yet shown to be warranted in this case, may be required in some *other* case, or upon changed circumstances in this one. The court of appeals reversed the district court's stay of trial as an "abuse of discretion" because the district court failed to identify, and the record failed to present, any particularized reason to believe that a trial would hinder Mr. Clinton's execution of official duty. *Id.* at 13 n.9. The district court actually saw "no reason why the discovery and deposition process could not proceed as to all persons including the President himself," and pointed to no burden unique to a trial that could justify a different result. *Id.* at 71. Given this holding, and given that Mr. Clinton and the Government claim that discovery would be at least as burdensome (if not more so) than a trial, *see* Pet. Br. 21; Br. for United States 24, it should be clear that there was "no reason why [a trial] could not proceed" as well on this record and in the particular circumstances of this case.

The opinion under review emphasized that a different record could indeed lead to a different result, and that the district court is *required* to do everything necessary to allow the President to carry out his constitutional duties:

> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15. Thus, the trial judge remains completely free under the circuit court's decision to "halt[ ] or delay[ ] or reschedul[e] *any* proposed action by *any* party at *any* time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (Beam, J., concurring; emphasis added). And Mr. Clinton remains free "to pursue motions for rescheduling, additional time, or continuances." Pet. App. 16.

Contrary to Mr. Clinton's assertions, such motions would not "entangle[ ]" the Judicial and Executive Branches "in an ongoing and mutually harmful relationship," would not require "the President . . . to provide detailed information about the nature of pending Executive Branch matters," and would not involve "the trial judge . . . passing judgment on the President's priorities." Pet. Br. 29. The court of appeals' decision directs *deference* to the presidency and mandates "judicial case management *sensitive* to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13 (emphasis added). The circuit court's reference to the need to "control[ ] the scheduling of the case as necessary to avoid interference with specific, particularized, clearly

articulated presidential duties," Pet. App. 16, when read in context, clearly does not invite scrutiny of Executive Branch affairs; it was meant to convey that the proper approach to protection of the presidency lay not in a blanket granting of immunity, for which Mr. Clinton argued, but in deferentially scheduling around the President's duties. While Mr. Clinton may not take the approach he took the below—to assert that his duties do not permit litigation of this or any case until he leaves office—he may properly assert, for example, that on particular days or weeks, he is not available for deposition or trial testimony because of presidential business, or that any matter, including his deposition, must be interrupted for official business. The district court is "duty-bound . . . to protect the President's ability to fulfill his . . . responsibilities," and thus "duty-bound" to defer to him. Pet. App. 15. For again, "nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25 (Beam, J., concurring).

Nothing in the court of appeals' decision requires or permits a trial judge to engage in judicial second-guessing of presidential priorities. The district court would have little opportunity to do so in any event. Busy and important people, like corporate chief executives and Cabinet secretaries, are frequently defendants in litigation—litigation far more complex than this—but their constant involvement in the cases is not required, because, like Mr. Clinton, they have good lawyers and assistants. But as the opinion below directs, Mr. Clinton will have even greater solicitude than would other defendants. While the only possible time other busy defendants would have to appear personally before the district court would be to testify, Mr. Clinton's appearance could be avoided by allowing him to testify by videotape. *Cf.* Pet. App. 23 (Beam, J., concurring); Pet. Br. 28 & n.25 (noting Mr. Clinton's videotaped testimony in Whitewater trials). Worry over money for defense costs and payment of a judgment is

even mitigated here, because Mr. Clinton is reportedly covered by insurance for an amount in excess of the *ad damnum* and by a legal defense fund.

Mr. Clinton attempts to assail the benefits of judicial deference by postulating remote hypotheticals that in any event do not advance his claim. His "national security" scenarios, for example, raise no realistic specter of danger to the functioning of the Executive Branch. The trial judge, under the court of appeals' decision, is to show deference to presidential interests in all circumstances, and surely there is no reason to believe that this deference will not be maintained when national-security issues are at stake. *Ex parte* and *in camera* procedures, moreover, may be used to protect the interests of the presidency. As for the hypothetical crisis offered by Mr. Clinton in which a President must "seek to maintain a pretense of 'business as usual' " and "simply having to ask a court for a change in the litigation schedule . . . . could be highly damaging," Pet. App. 31, any difficulty there would not be caused or exacerbated by the litigation; if the President were previously scheduled to give a speech, attend a conference, play golf, conduct a meeting, or go on a campaign tour, "simply having to [seek] a change in the . . . schedule" would be just as "damaging" in those circumstances as well.

Mr. Clinton's assertions about hypothetical litigation in state courts do not help his argument. This case is in federal court, and there is no need for this Court to address events in a state-court litigation that may never occur. And if a President is ever to be sued for personal acts in a state court, it would most likely be in a court of his own home state, a forum that would likely be convenient and familiar to him.[17]

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[17] One scenario would be assertion of purely state-law claims by a plaintiff from his own state, in which case there would be no diversity jurisdiction, 28 U.S.C. § 1332(a)(1) (1994). Such claims, given the citizenship of the parties, would most likely be brought in the state courts of that state. Another scenario would be the situation in which a diverse plaintiff chose to sue the President in the state courts of his home state,

In any event, Mr. Clinton's claim that " 'case management' by state trial courts is inconsistent with principles of federalism," Pet. Br. 33, actually stands those principles on their head. Under the principles of federalism repeatedly articulated by this Court, it may not be presumed that "state trial judges" will display "local partisan hostility," *id.* at 33-34, or that they will refuse to respect the constitutional duties of the President. The opposite presumption is required. "Article VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties." *Pennzoil* v. *Texaco*, 481 U.S. 1, 15 (1987). Accordingly, "[m]inimal respect for the state processes . . . precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Even if this case had been brought in state court, this Court could not decide it by assuming that a state court would act unlawfully.[18]

The scheme of deference established by the court of appeals will not "work any judicial usurpation of properly executive functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), and will not " 'prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989)

in which event the President would not be able to remove the action to federal court on diversity grounds, *id.* § 1441(b). But in all other cases in which a diverse plaintiff sued a President in state court on state-law claims, the action would of course be removable.

[18] Nor is there any merit to Mr. Clinton's suggestion that this case should be deferred because, given the President's position as a political official, it would supposedly thrust the courts into the "political arena." Pet. Br. 32. Needless to say, there is no "political person" doctrine, and in fact the federal courts find it frequently necessary to address cases that, unlike this one, actually do involve questions of law and fact having direct and controversial implications in the political arena. *E.g.*, *Shaw* v. *Reno*, 116 S. Ct. 1894 (1996) (redistricting); *Romer* v. *Evans*, 116 S. Ct. 1620 (1996) (homosexual rights).

(quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). It will instead ensure that this case will not cause even the slightest impairment of presidential business.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT, ON THIS BARREN FACTUAL RECORD, THERE IS NO BASIS FOR A STAY OF THE TRIAL OR THE LITIGATION GENERALLY.

Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary *immunity* from trial," an "immunity from trial as [*Nixon* v.] *Fitzgerald* seems to require." Pet. App. 68 (emphasis added); *see* Pet. Br. 45-47. Citing this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248 (1936), which governs the issuance of discretionary litigation stays, Mr. Clinton argues that the district court did not abuse its discretion in ordering a postponement of trial. But he made no record below that would justify *any* stay whatsoever under *Landis*. Accordingly, the Court of Appeals correctly found that what the District Court ordered—a postponement of the trial until perhaps the year *2001*—not only was "the functional equivalent of a grant of temporary immunity," but was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays. Pet App. 13 n.9.[19]

In *Landis* v. *North American Co.*, 299 U.S. 248 (1936), the Court did indeed hold that "the power to stay proceedings is incidental to the power inherent in every court to control the

[19] The district judge cited her equity powers and Fed. R. Civ. P. 40, together with a finding of a "temporary or limited immunity from trial," to put the case on hold as far as a trial is concerned. Pet. App. 70-71. But her equity powers and Rule 40 were invoked because she incorrectly found an immunity from trial, as both she and the court of appeals made clear. *Id.*; *accord id.* at 13 & n.9. Thus, if her holding as to an immunity from trial fails, so should the alternative grounds for postponement fail as an abuse of discretion.

disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. But the Court made clear that a stay of litigation could be granted "[o]nly in rare circumstances." *Id.* at 255. In particular, "the *suppliant* for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* (emphasis added). "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the . . . suppliant[ ] for relief, and discretion [is] abused if the stay [is] not kept within the bounds of moderation." *Id.* at 256.

Under *Landis*, it was Mr. Clinton's "heav[y]" burden to show why a stay was required. As stated above, however, he made no effort to show why the litigation of *this* simple case would *in fact* present him, or the presidency, any "clear . . . hardship or inequity." Rather than try to make such a showing—which, given the simplicity of this case, was impossible to make—Mr. Clinton resorted to reliance on hypothetical circumstances. He chose to argue in the abstract, as he does here, that litigation generally (including a hypothetical torrent of future cases) could someday pose an undue burden upon his Office. Apart from being incorrect, that argument fails to meet the *Landis* criteria. It fails to establish—indeed, it fails really to assert—that there will in fact be "hardship or inequity" in *this* case, or that *this* case was of such an "extraordinary public moment," *Landis*, 299 U.S. at 256, that any part of it should not be allowed to proceed.

The court of appeals was entirely faithful to *Landis* in reversing the district court's categorical and indefinite postponement of trial. In granting trial "immunity" to Mr. Clinton, far from considering "the particular facts at hand" (Pet. Br. 45), the district court made no finding that Mr. Clinton had made any showing of an actual "clear case of hardship," and cited *no* facts that would support such a finding (and could not, because, again, Mr. Clinton did not even try to present

such facts). The closest the district court came to a finding was a conclusory statement that "[n]either is this a case that would likely be tried with few demands on Presidential time"– a statement that not only came without any indication of whether those demands would amount to clear inequity or hardship, but was manifestly insupportable in a case centering upon a short encounter between two people in a room.

On the other side of the balance, as Judge Beam explained, the danger of harm to Mrs. Jones is manifest. She "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." Pet. App. 17. The district court not only incorrectly disregarded this harm, but ignored Mrs. Jones's well-pleaded reasons why the commencement of this action was delayed, and ignored the fact that public aspersions upon Mrs. Jones reputation had made it necessary for her to proceed. Complaint ¶¶ 41-51.[20] Beyond this, the passage of time contemplated by the District Court's order—possibly into the next century—was surely "immoderate" and impermissible under *Landis*. Even in "cases of extraordinary public moment"—which this one, given the lack of burden, is not—*Landis* requires that a delay cannot be "immoderate in extent." 299 U.S. at 256. In *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year." 299 U.S. at 256.

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[20] Throughout the briefs of Mr. Clinton's Solicitor General and academic *amici*, the importance of Mrs. Jones' case is downplayed because of a supposed delay in filing her case. As noted above, public defamation in early 1994 caused her to proceed immediately to file a case that would not otherwise have been brought when few people knew about the harassment in 1991. Also to be noted is that the defamation action had recently accrued when she sued in May 1994. Of course, the speed of filing has never, so far as we can tell, governed the speed of litigation. Otherwise, a litigant Smith, whose cause of action arose after another plaintiff, Jones, had filed a similar action just before the limitations deadline, would have precedence on the court's docket even if Smith filed one day after his cause of action arose!

The district court was neither presented with, nor did it point to, a record of "clear hardship and inequity" as required by *Landis*. What the district court really did was what it candidly said it had done: to create a new rule of law establishing a "limited or temporary *immunity* from trial," a new kind of immunity that it believed, quite incorrectly, "[*Nixon* v.] *Fitzgerald* seems to require." Pet. App. 68, 70 (emphasis added). Apart from being based upon a clear error of law, the district court's ruling was an abuse of discretion because it was *not* an exercise of discretion. Reversal of the district court's "stay" order, if anything, was all but *required* under *Landis*.

Mr. Clinton makes a final effort to restore the district court's "trial immunity" order by contending that the court of appeals lacked jurisdiction to review it. Pet. Br. 43-45. This argument, which Mr. Clinton has not even mentioned in his list of questions presented, is meritless.

In appealing the denial of his claim of "immunity" (which was the word Mr. Clinton repeatedly used in both courts below to describe his claim), Mr. Clinton argued that the district judge's decision was "inherently inconsistent," that the "result that the District Court arrived at here—deferring trial but not discovery"—was "illogical" because principles of "immunity" under *Nixon* v. *Fitzgerald* required deferral of both. Opening Brief of Appellant President William Jefferson Clinton at 10, 23, *Jones* v. *Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995). His "statement of issues" and list of principal authorities in that court thus read:

> 1. Whether the Constitution and principles of separation of powers require the dismissal without prejudice of this civil damages suit against an incumbent President and his co-defendant, and the tolling of any statutes of limitation applicable to the claims asserted therein, until such time as the President is no longer in office.
>
> *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .

> 2. Whether the District Court erred in holding that the Supreme Court's decision in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), requires that sitting Presidents be immune only from trial, but not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the Office of the President.
>
> *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .
>
> 3. Whether the District Court, having found that it is not in the national interest to distract the President with the burdens of trial in private civil litigation, erred in refusing on the same basis to stay the proceedings in their entirety, until such time as the President leaves office.
>
> *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .

Id. at vii-ix.

All of Mr. Clinton's questions presented in the Eighth Circuit were to the same effect: *Nixon* v. *Fitzgerald* and the principles of immunity expressed in that case required the postponement of *both* discovery and trial (regardless of whether the postponement takes the form of a stay or dismissal). Jurisdiction over Mr. Clinton's appeal was premised upon the principle that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." *Id.* at vii (citing *Nixon* v. *Fitzgerald*, *supra*); *accord* Pet. Br. 4 n.3 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). Mrs. Jones cross-appealed, arguing (as she does here) precisely the converse of what Mr. Clinton was arguing—namely, that *Nixon* v. *Fitzgerald* justified *neither* the postponement of discovery nor the postponement of trial—and argued that jursidicton over her cross-appeal was proper under principles of pendent appellate jurisdiction.

The Eighth Circuit correctly held that the cross-appeal could properly be entertained as an exercise of pendent appel-

late jurisdiction. As this Court has recognized, pendent appellate jurisdiction is a concept that has been "endorsed" by all the federal courts of appeals, *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1209 n.2 (1995) (citing cases from each Circuit); it is typically held to apply when the pendent issue is "inextricably intertwined with" the primary issue on review, *id. at 1212*. And if ever there were a case where such jurisdiction was justified, this is it. For the question whether Mr. Clinton is entitled to a postponement of just a trial, far from being "very distinct" (Pet. Br. 44) from the question whether he is entitled to a postponement of the litigation entirely, is part and parcel of it. Indeed, as Mr. Clinton's own questions presented below show, the questions were in his view one and the same. In both the district court and the court of appeals, *he* argued that he was entitled, *as a matter of law*, to an immunity or stay as to *all* proceedings, *including* the trial, for *one* reason, and one reason *alone*—the fact that he is President of the United States. Mrs. Jones' cross-appeal argued a point that indisputably was inextricably intertwined with, indeed subsumed within, Mr. Clinton's claim—namely, to borrow the district court's words, whether he was entitled to "a temporary or limited immunity from trial [under] *Fitzgerald*." Pet. App. 70. The court of appeals reached the obvious conclusion that both appeals

> are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" than these, where answering one question of law resolves them all.

Pet. App. 5 n.4.

Finally, nothing in this Court's decision in *Swint* v. *Chambers County Commission*, *supra*, casts doubt upon the exercise of pendent jurisdiction in this case. At issue in *Swint* was a purported exercise of " 'pendent party' " appellate jurisdiction, *Swint*, 115 S. Ct. at 1206; there were "parties who were not involved in the appealable order but were parties to

the pendent order," *Gilda Marx, Inc.* v. *Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996) (per curiam). One group of defendants appealed the denial of their summary judgment motion, which was based upon a claim of qualified immunity, that appeal was plainly proper under *Mitchell* v. *Forsyth*, *supra*. *See* 115 S. Ct. at 1207. Another defendant, the Chambers County Commission, appealed the denial of its separate summary judgment motion, which did not involve the immunity issue and was not independently appealable. *Id.* at 1207-08. This Court, noting that "[w]e need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable," held that pendent appellate jurisdiction was not proper because the parties did not, and could not, "contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 1212.

As noted in *Swint*, this Court "ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." *Id.* at 1211 (citing cases). And since *Swint*, the courts of appeals have continued to recognize the validity of pendent appellate jurisdiction, and have carefully confined the exercise of that jurisdiction to questions that are "inextricably intertwined" with those as to which independent bases of jurisdiction exist.[21] There is no

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[21] *See, e.g.*, *Martin* v. *Memorial Hospital*, 86 F.3d 1391, 1401 (5th Cir. 1996) (noting that *Swint* implied that pendent appellate jurisdiction was proper where "inextricably intertwined" standard was met); *Eagle* v. *Morgan*, 88 F.3d 620, 628 (8th Cir. 1996) (applying "inextricably intertwined" standard, and exercising pendent appellate jurisdiction); *Gilda Marx, Inc.* v. *Wildwood Exercise, Inc.*, 85 F.3d 675, 678-79 (D.C. Cir. 1996) (per curiam) (recognizing continued validity of pendent appellate jurisdiction under "inextricably intertwined" standard); *Cooper* v. *Town*

reason to depart from that course here. No pendent party was involved. And the pendent appellate question, whether there existed a "temporary immunity from trial," was bound up in the question that Mr. Clinton presented, which was whether there was a "temporary immunity" from all proceedings; the pendent issue was an integral part of the decision that Mr. Clinton appealed. There was thus no danger here of turning a "collateral order[ ] into [a] multi-issue interlocutory appeal ticket." *Swint*, 115 S. Ct. at 1211. Indeed, it would have been wasteful and illogical for the Eighth Circuit to have held that Mr. Clinton was not entitled to the full immunity from litigation that he claimed, but to have held itself powerless to correct the district court's erroneous holding that there existed a "temporary immunity from trial." This Court's cases "indicate that [the courts of appeals] should give the jurisdictional statutes a 'practical contstruction,' " *Gilda Marx* v. *Wildwood Exercise*, *supra*, 85 F.3d at 678(quoting *Swint*, 115 S. Ct. at 1207-08 (citation omitted)), and such a construction surely requires, at a minimum, the exercise of pendent jurisdiction here.

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of East Hampton, 83 F.3d 31, 36 (2d Cir. 1996) (same); *Brennan* v. *Township of Northville*, 78 F.3d 1152, 1157 (6th Cir. 1996) (same); *Dolihite* v. *Maughon*, 74 F.3d 1027, 1035 (11th Cir. 1996) (same), *petition for cert. filed* (June 19, 1996); *Sevier* v. *City of Lawrence*, 60 F.3d 695, 701 (10th Cir. 1995) (same).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 95-1853

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The active litigation of a personal damages action against an incumbent President is unknown in our constitutional tradition. Such litigation would divert a President's energy and attention from his official duties, and would spawn a series of constitutional confrontations between the courts and the President. The litigation of such actions should therefore be deferred, in all but the most exceptional cases, until the President leaves office.

Respondent and her amici offer a number of unfounded arguments in opposition to deferral. They assert that litigation of this kind should not be viewed as an extraordinary event, even though history clearly shows that it is. They insist, in the face of overwhelming evidence to the contrary, that the burdens of the Presidency are not so great that such litigation would impede a President's ability to discharge his responsibilities. And they contend that deferral of such actions would

place a President "above the law" -- even though the President would remain amenable to liability when he leaves office.

Ultimately, however, respondent and her amici concede that such litigation would jeopardize a President's ability to discharge his constitutional responsibilities, and that some means must be found to protect the proper functioning of government. The question is how this is to be done. Respondent's proposed solution -- ad hoc "case management" by state and federal trial judges -- is no solution at all. It would multiply the litigation burdens on the Presidency and invite the use of civil litigation as a political weapon. Most troubling, it would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President should attend to private litigation at the expense of his official duties -- rulings that inevitably would enmesh the trial court in Executive Branch management.

Deferral, by contrast, eliminates these problems. This limited form of protection accommodates both a plaintiff's right to seek legal redress, and the public interest in having a President available to perform the unique and demanding duties of his office. Deferral also preserves the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or The Separation Of Powers.

Perhaps the most striking feature of the briefs of respondent and her amici is the contrast between their abstract complaint that deferral would place the President "above the law,"[1] and their energetic assertions that trial courts should

[1] Brief for Respondent ("Resp. Br.") 16. *See also* Brief of *Amicus Curiae* of Law Professors in Support of Respondent ("Resp. Prof. Br.") 3; Brief for *Amicus Curiae* Coalition of American Veterans ("CAV Br.") 10-11.

conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than . . . other defendants." *Id.* at 36. Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (*id.* at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." *Id.* at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should " 'halt[] or delay[] or reschedul[e] *any* proposed action by *any* party at *any* time should she find that the duties of the presidency are even *slightly* imperiled.' " *Id.* at 35, 36 (quoting Pet. App. 25 (Beam, J., concurring)) (emphases added by respondent).

Respondent's amici further advocate special procedural rules in cases where the President is a defendant, such as holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Prof. Br. 21-22; *see also* Pet. App. 23 (Beam, J., concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant."[2]

As this chorus of accommodation and deference illustrates, this case is not about whether the President is "above the law." Rather, this case is about identifying the proper means of protecting the compelling interests that are impli-

[2] Brief of *Amicus Curiae* American Civil Liberties Union ("ACLU Br.") 6.

cated when a private civil damages suit is filed against a sitting President. Respondent's "scheme of deference," however, actually endangers these interests; that is why deferral is the proper approach.

To begin with, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. But she does not repudiate the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." Pet. App. 16. The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it necessarily gives capacious discretion to trial judges.

Moreover, in the real world of litigation, it is inevitable that whenever the President seeks to postpone some scheduled aspect of the litigation, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections in all likelihood will include, as they have here, claims that the President is abusing his office to obtain some undeserved litigation advantage, or that he seeks delay for political purposes. The trial judge will then have to decide, in a highly adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this function, the trial judge will have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries -- likely to occur repeatedly throughout the litigation -- present a serious threat to separation of powers, as well as to the integrity of sensitive information about matters of national concern. *See* Brief for the Petitioner ("Pet. Br.") 29-34. And it should be evident that these problems are far more intractable when the President is

a defendant than when he is asked merely to give third-party testimony. *See id.* 26-29.

Ad hoc case management also cannot protect a President who is faced with an ever increasing number of civil damages actions. *See* Resp. Br. 7 (quoting Pet. App. 15). If more and more such suits are filed for purposes of publicity or partisan gain -- and in today's "no holds barred" political arena, there is every reason to believe that they will be -- it will be impossible for individual judges issuing piecemeal rulings in individual cases to manage the threat. However well-intentioned and deferential they may be, they will simply be unable to provide a coordinated response to the burgeoning obligations such litigation would impose on the President. Only a generally applicable prophylactic will adequately prevent overburdening the Presidency.

In short, the disadvantages of respondent's scheme are great when compared to a simple rule of deferral. Respondent's scheme necessarily creates serious separation of powers problems; deferral averts those problems. Respondent's scheme augments the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, it would not justify the substantial costs that it would inflict on our system of government.

B. Respondent's Scheme Cannot Be Reconciled With *Fitzgerald* And This Court's Other Immunity Decisions.

Contrary to respondent's contention, the deferral the President seeks here is not an expansion of the absolute immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). It is a considerably narrower remedy, because it does not insulate a President from liability. Deferral is, moreover,

strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's other immunity decisions.

Respondent spends a great deal of energy arguing that *Fitzgerald* does not mean what it says. For example, respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making. Resp. Br. at 11-16. The Court, however, noted how the simple fact of on-going litigation could interfere with the performance of official duties. The Court was quite explicit in saying that "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. And the Court explained that the President's exceptional immunity is necessary because "[t]he President occupies a unique position in the constitutional scheme" (*id.* at 749) and performs "singular[ly] importan[t] . . . duties." *Id.* at 751. The Court went out of its way to note that the President is "an easily identifiable target for suits for civil damages," and found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Each of these rationales for absolute immunity in *Fitzgerald* also dictates the more modest remedy of deferral in this case.[3]

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[3] *See also id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . . ."). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. Resp. Br. 11 (quoting *Fitzgerald*, 457 U.S. at 761 n.4 (Burger, C.J., concurring)). We of course, do not disagree with this statement, which addresses *absolute* immunity, in a case involving a *former* President. The Chief Justice's language quoted at the beginning of this note, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation of any kind could go forward against a sitting President. In fact, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed. Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).[4] A denial of immunity, qualified or absolute, is also immediately appealable, precisely because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870 (1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

These doctrines would make no sense if, as respondent supposes, damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction . . . from . . . dut[y]" *(Harlow*, 457 U.S. at 816), however good a public official's "lawyers and assistants" may be. This is so even

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[4] In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

when, as is typical in immunity cases, the defendant official is represented by government lawyers. Here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal conduct by the President. The complaint unjustifiably attacks the President's integrity, alleges serious wrongdoing, and seeks to hold him personally liable for hundreds of thousands of dollars in damages. In this context, respondent's notion that a President can largely disregard the litigation -- or that he would choose to do so -- and rely instead on his lawyers, is simply implausible. *See* Pet. Br. 22-23.

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule that is a much greater imposition on potential plaintiffs than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is one of "manifest simplicity" (Resp. Br. 9), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily,[5] and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery.[6] Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

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[5] Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13.

[6] Resp. Br. 27; Resp. Prof. Br. 6; ACLU Br. 4.

Every one of these arguments could be said to militate against absolute Presidential immunity as well. Yet the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did not attempt to differentiate "simple" suits from others -- for the obvious reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.[7] The Court in *Fitzgerald* also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. 457 U.S. at 752 n.32 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). Nor did *Fitzgerald* rely on ad hoc trial court determinations, based on particularized showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.

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[7] The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a simple case (Resp. Br. 9, 27, 28, 40), respondent's counsel fail to credit their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 117-18, 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses (C.A. App. 117-18); and that they may seek to compel an unprecedented physical examination of the President. *Id.* As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBaton, *Sexual Harassment Suit Should Not Be Tried While Clinton Is President, Judge Rules*, N.Y. TIMES, Dec. 29, 1994, at B6.

C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Duties Of His Office.

Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. Resp. Br. 29 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d)). President Jefferson refuted this assertion at the time it was made.[8] Since then, of course, the burdens on the Presidency have increased exponentially.

There simply is no basis for respondent's bald assertion that "Presidents have always had time to fulfill personal commitments." Resp. Br. 29. To the contrary, as documented in the Solicitor General's brief, almost every President has remarked on the incessant demands of the office.[9] This is not surprising, in view of the fact that the Constitution vests the entire power of the Executive Branch in a single individual. U.S. CONST. art. II, § 1. As David McCullough, a pre-

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[8] President Jefferson responded:

> The Judge [Marshall] says, "*it is apparent* that the President's duties as chief magistrate do not demand his whole time . . . ." If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on as unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing. . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

Letter from Thomas Jefferson to George Hay, (June 20, 1807), 11 The Writings of Thomas Jefferson 239, 242 (Andrew A. Lipscomb ed., 1904).

[9] Brief of *Amicus Curiae* United States, 10-12.

eminent biographer of Presidents, recently observed, to be the Chief Executive is to experience "unrelenting responsibility."

> It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.[10]

The Presidency, he concluded, is "the hardest job in the world." *Id.*[11]

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[10] Mr. McCullough further observed:

> [W]e're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit . . . . [H]e is the only person, the only individual who represents all the people.
>
> . . . .
>
> . . . It's beyond anyone's previous experience or natural ability. . . . I don't think anybody -- no historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

Comments of David McCullough, *Riding The Tiger* (CNN television broadcast, Sept. 8, 1996) (Tr. # 934-2, available in LEXIS, Nexis Library, Script File). Mr. McCullough is the author of *Truman* (Simon & Schuster 1992), and *Mornings On Horseback*, a biography of Theodore Roosevelt (Simon & Schuster 1981), and is currently working on a history of the Presidencies of John Adams and Thomas Jefferson.

[11] Respondent also states incorrectly that the lawsuit against President Truman was "actively litigated during his term in office." Resp. Br. 32 n.15. That suit was dismissed by the trial court on April 11, 1945, the day before President Roosevelt died and Harry Truman became President. Notice of Appeal, *DeVault v. Truman*, No. 498465, (Jackson County Cir. Ct., Mo.) filed April 18, 1945. As stated in our opening brief, the only activity in the case after President Truman took office was the appeal of the dismissal, which was sustained on purely legal grounds. *DeVault v.*

Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. *See* Pet. Br. 13 n.9. In the litigation setting, however, the President would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a number of analogous contexts in which litigation is stayed -- often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; *see also* Resp. Prof. Br. 2. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privilege" of the President than any other incident of his office, or than any immunity or similar protection is for any other public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It

Truman, 194 S.W.2d 29 (Mo. 1946). Accordingly, President Truman was not involved in active litigation while in office.

attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.

Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. 34-37.[12] Respondent simply cannot explain why the compelling interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.[13]

[12] In this regard, respondent incorrectly asserts that pursuant to the automatic stay in bankruptcy, a plaintiff's tort claims are simply transferred to bankruptcy court and "immediately addressed" there. Resp. Br. 25. This is not so. The litigation cannot proceed in any forum without leave from the bankruptcy court, which typically is not granted until the court approves a plan for the debtor's estate, a complicated process that can take months or years. *See, e.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 847-48 (5th Cir. 1990); *In re Washington Mfg. Co.*, 118 B.R. 555, 559-60 (Bankr. M.D. Tenn. 1990). The reality is that most claimants must wait long periods before their claims are addressed, if ever. *See, e.g., Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 907 (6th Cir. 1993).

[13] On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. Resp. Br. 26; Resp. Prof. Br. 19 n.14; CVA Br., *passim*. In *Fitzgerald*, however, the Court recognized that certain privileges and immunities are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and immunities. *Id.* at 750 n.31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court

E. Deferral Will Not Lead To Abuse Of Office.

Respondent raises the specter that deferral would shelter a variety of Presidential wrongdoing, from defaulting on a debt to committing battery. Resp. Br. 24. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. *See* Pet. Br. 37; *Fitzgerald*, 457 U.S. at 757. These deterrents -- coupled with the knowledge that a plaintiff could vigorously pursue a civil claim and subject a President to damages following his tenure in office -- are sufficient to discourage misconduct in his private affairs. Realistically, with respect to deterrence and accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent.

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declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in Section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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38 pp

QUESTION PRESENTED

Whether a private civil action for damages against the President of the United States, based on events occurring before the President took office, should be permitted to go forward during the President's term of office.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

This is a private civil action for damages against the President of the United States based on conduct that is alleged to have occurred before the President took office. The decision below compels the President to participate in discovery and defend himself at trial while he is in office. The United States has a substantial interest in protecting the Office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be

compelled to take part in judicial proceedings in state or federal court.[1]

STATEMENT

1. In May 1994, respondent Paula Corbin Jones filed a civil action against petitioner William Jefferson Clinton, President of the United States and former Governor of Arkansas, and Danny Ferguson, an Arkansas state trooper. Respondent alleged that then-Governor Clinton had sexually harassed her three years earlier, when respondent was a state employee, and that she was thereafter subjected to job-related retaliation. Compl. ¶¶ 6-34, 39. She further alleged that she was defamed in 1994 by statements, which she attributed to the President and Ferguson, relating to the alleged harassment.

Respondent filed a four-count complaint in the United States District Court for the Eastern District of Arkansas, presenting federal and state law claims against the President and Ferguson.[2] With respect to each of the four counts, she sought $75,000 in compensatory damages and $100,000 in punitive damages. Respondent did not seek injunctive relief.

[1] The United States has participated in other cases that have presented related issues of Presidential participation in judicial proceedings. The United States participated as an *amicus curiae* in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which involved the President's immunity from civil actions for damages based on the President's conduct in office. Similarly, in *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), which involved the amenability of a sitting Vice President to a criminal indictment and trial, the United States also addressed the amenability of a sitting President to prosecution. In addition, the United States participated as an *amicus curiae* in *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990), regarding the amenability of former President Reagan to a criminal subpoena relating to the Iran-Contra affair, and currently is participating in *United States* v. *McDougal*, Nos. 96-2606 & 96-2671 (8th Cir.) regarding testimonial subpoenas issued to President Clinton. The United States has participated as well in federal and state courts in cases involving the immunity of foreign heads of state. See, *e.g.*, *LaFontant* v. *Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Anonymous* v. *Anonymous*, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

In August 1994, the President filed a motion to dismiss the suit without prejudice or, in the alternative, to stay the suit until the conclusion of his service in office. In December 1994, the district court entered an order denying the President's motion to dismiss but partially granting the President's alternative motion for a stay. Pet. App. 54-77. The district court held, however, that pretrial discovery could proceed "as to all persons including the President himself." *Id.* at 71.

2. The President and respondent filed timely cross-appeals from the district court's order. A divided panel of the Eighth Circuit affirmed the denial of the President's motion to dismiss, reversed the grant of a partial stay, and remanded with instructions to allow the suit to proceed. Pet. App. 1-31. The court held that the President "is entitled to immunity, if at all, only because the Constitution ordains it." *Id.* at 16. It then determined that the Constitution does not grant the President immunity from private suits based on his unofficial acts. *Ibid.* It reasoned that the President's absolute immunity under *Nixon* v. *Fitzgerald*, 457 U.S. 831 (1982), for acts within the "outer perimeter" of his official duties represents the only Presidential immunity under the Constitution. Pet. App. 8-9.

[2] Count I asserts due process and equal protection claims against Clinton under 42 U.S.C. 1983. Count II asserts a claim under 42 U.S.C. 1985 against Clinton and Ferguson for conspiracy to commit the constitutional violations alleged in Count I. Count III presents a common law claim against Clinton for intentional infliction of emotional distress. Count IV presents common law claims against Clinton and Ferguson for defamation. See Pet. App. 4, 41.

The court held that it was an abuse of discretion for the district court to stay the trial in the absence of constitutionally mandated immunity. *Id.* at 13 n.9. The dissenting judge concluded that private actions for damages against a sitting President based on the President's unofficial acts should be stayed until the completion of the President's term "unless exigent circumstances can be shown." *Id.* at 25.

SUMMARY OF ARGUMENT

1. To require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties, in violation of separation of powers principles. In both constitutional and practical terms, the demands placed upon the President under Article II are unceasing. A sitting President cannot defend himself against litigation seeking to impose personal financial liability without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to participate in the defense of a private civil suit would therefore place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions.

This Court's decision in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), strongly indicates that the instant suit should be deferred. Although *Fitzgerald* involved a challenge to the President's performance of his official functions, the Court's analysis is highly relevant to the question whether litigation involving alleged pre-Presidential misconduct may go forward during the President's term of office. The Court's decision makes clear that the public interest in the President's unimpaired performance of his duties must take precedence over a private litigant's

desire to obtain redress for legal wrongs. The court of appeals erred in concluding that deferral of this lawsuit would represent an unwarranted extension of the rule announced in *Fitzgerald*. The burdens created by the litigation process pose a different threat to the Presidency than that which concerned the Court in *Fitzgerald*, but the threat is no less real. Deferral of the instant case, moreover, would be far less burdensome to the plaintiff than was the absolute immunity recognized in *Fitzgerald*, which *permanently* foreclosed the plaintiff from seeking redress in court for wrongs allegedly done by the President in his official capacity.

2. The power to stay civil proceedings is a basic and long-settled judicial power. Staying a private suit until the conclusion of the President's term of office prevents the diversion of the President's time and attention while preserving the plaintiff's right ultimately to obtain redress if her claims are determined to be meritorious. A stay therefore strikes the appropriate balance between the public and private interests involved. Because the burdens imposed by pretrial discovery are frequently greater than those imposed by the trial itself, the public and constitutional interests implicated by this suit can be adequately protected only if discovery (as well as trial) is stayed until the conclusion of the President's service.

The court of appeals erred in concluding that the threat posed by ongoing civil litigation against the President could be adequately addressed by "judicial case management." In view of the unceasing nature of the President's official duties, the requirement that the President defend against a private lawsuit during his term of office necessarily and seriously impairs his authority to balance the competing demands upon his attention. The problem is exacerbated by the fact that the President may not be at liberty to articulate publicly the precise nature of those

competing demands. In addition, reliance on case management potentially subjects sitting Presidents to broad and possibly inconsistent exercises of discretion by state and federal trial judges across the country.

ARGUMENT

President James Monroe observed that the duties entrusted to the President "are sufficient to employ the whole mind, and the unceasing labors, of any individual." Herman Finer, *The Presidency: Crisis and Regeneration* 35-36 (1960). This case presents the question whether, notwithstanding those continuous constitutional duties, a sitting President may be compelled to defend himself against private claims for damages, based on events that are unrelated to the exercise of his official duties and are alleged to have occurred prior to his term of office.[3]

The court of appeals failed to recognize the fundamental incompatibility between the private demands of civil litigation and the President's constitutional responsibilities for exercising the "executive Power" of the United States.[4] The court also misunderstood the

[3] The case also presents one claim, the defamation claim in Count IV, that concerns statements made after the President took office. Count IV thus raises an additional and distinct immunity question under *Fitzgerald*, *supra*. Neither the district court nor the court of appeals addressed whether Count IV comes within the scope of the President's absolute immunity under *Fitzgerald* (see Pet. App. 9 n.7), and that issue is not before this Court.

[4] The United States is aware of three instances prior to this one in which a private suit against a President based on events occurring before the President took office have been heard during the President's term. Those instances are noted in the opinion of the court of appeals. See Pet. App. 14 n.10. Each of those cases was commenced before the beginning of the President's service—indeed, two were already on appeal when the President took office. *Ibid*. As far as the United States has been able to determine, none of the courts was asked to dismiss or stay the litigation on the basis of any constitutionally grounded immunity after the President took office. See *ibid*.

significance of this Court's decision in *Fitzgerald*, which supports rather than forecloses the President's request to postpone this litigation. Finally, the court of appeals was mistaken in believing that the danger to the Presidency posed by suits like this one can be addressed through *ad hoc* exercises in judicial "case management." A rule that subjects sitting Presidents to suits in state and federal courts across the country, subject to the exercise of discretion by trial judges over the day-to-day management of the litigation, would leave the President's discharge of his official responsibilities in serious jeopardy. It would also enmesh state courts in the affairs of the national government and federal courts in the conduct of the head of a coordinate Branch. Only a complete stay of proceedings during the President's service in office takes sufficient account of the constitutional interests of the United States at stake in this case.

I. COMPELLING A SITTING PRESIDENT TO DEFEND HIMSELF IN PRIVATE LITIGATION CONFLICTS WITH THE REQUIREMENTS OF THE PRESIDENT'S OFFICE UNDER ARTICLE II OF THE CONSTITUTION

A. Proper analysis of the issue before this Court begins with the "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 116 S. Ct. 1737, 1743 (1996); see also *Nixon* v. *Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977) ("the proper inquiry focuses on the extent to which [the challenged action] prevents the Executive Branch from accomplishing its constitutionally assigned func-

tions"). Separation of powers principles "require[] that a branch not impair another in the performance of its constitutional duties." *Loving*, 116 S. Ct. at 1743.

Those concerns are implicated whenever a litigant seeks to invoke the processes of the courts against the President. To be sure, separation of powers principles "do[] not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*, 457 U.S. at 753-754; see *United States* v. *Nixon*, 418 U.S. 683 (1974). Nonetheless, "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753; see, *e.g.*, *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (construing APA's judicial review provisions not to apply to President "[o]ut of respect for the separation of powers and the unique constitutional position of the President"); *United States* v. *Nixon*, 418 U.S. at 708 (quoting *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. D. Va. 1807) (No. 14,694)) ("[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual"). Accordingly, "before exercising jurisdiction, [a court] must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 753-754.

If the President is required to defend himself against private lawsuits during his term of office, "the dangers of intrusion on the authority and functions of the Executive Branch" are manifest. The "burdens, stress, and time [associated with] litigation," *Marek* v. *Chesney*, 473 U.S. 1, 10 (1985), are well known. See generally *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991) (discussing litigation burdens); *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (same); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982) (same). Learned Hand observed that, "as a litigant, I

should dread a lawsuit beyond almost anything else short of sickness and of death." Jerome Frank, *Courts on Trial* 40 (1950). Where claims focus on a defendant's actions, the defendant must devote substantial time and energy to the factual disputes underlying the claims. Among other things, the defendant must prepare for and give deposition testimony; provide the information needed to pursue and answer other forms of discovery demands; and assist his counsel in developing the factual record. In addition, the defendant must consult with his counsel on an ongoing basis about choices relating to pretrial and trial strategy.

Those burdens, while real and substantial, are ordinarily a matter of purely private concern. When they are imposed on the President, however, they implicate public and governmental interests of constitutional dimension. "The President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." *Fitzgerald*, 457 U.S. at 749, 750. The President is the sole repository of the "executive Power" created by Article II of the Constitution. *Id.* at 749-750. He bears the power and responsibility to "take Care that the Laws [are] faithfully executed." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Take Care Clause constitutes "the Chief Executive's most important constitutional duty"). The President serves as "the sole organ of the federal government in the field of international relations," *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936), and his "duties as Commander in Chief * * * require him to take responsible and continuing action to superintend the military," *Loving*, 116 S. Ct. at 1750. In the words of former President Truman, "every final important decision has to be made right here on the President's desk, and only the President can make it." Edward Corwin, *The President: Office and Powers, 1787-1984* (1984).

In both practical and constitutional terms, the demands placed on the President under Article II are unceasing. The President sits at the apex of an Executive Branch that includes nearly 3 million civilian employees. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1995*, at 350 (1995). As Commander in Chief he directs the activities of over 1 million active duty service members. *Id.* at 357. Our system of government presumes, moreover, that the President will exercise ultimate authority over—and will accept political accountability for—the actions of all officials within the Executive Branch and the Armed Forces. Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference to unelected agency officials is justified because "[w]hile agencies are not directly accountable to the people, the Chief Executive is"); *Myers* v. *United States*, 272 U.S. 52, 123 (1926) ("it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide").

As a practical matter, the countless issues of domestic and foreign policy that demand the President's attention fully occupy, and indeed outstrip, the capacity of the President to respond. See, *e.g.*, Clinton Rossiter, *The American Presidency* 2, 28 (1987). In the words of one scholar, "[b]eing president is a little like being a juggler who is already juggling too many balls and, at the most frustrating moments, is forever having more balls tossed at him." Thomas E. Cronin, *The State of the Presidency* 156 (1980). Another scholar has observed that the President "is expected to do too many jobs at once; he cannot give proper attention to them all. He must simultaneously conduct the diplomacy of a superpower, put

together separate coalitions to enact every piece of legislation required by a vast and complex society, manage the economy, command the armed forces, serve as a spiritual example and inspiration, respond to every emergency." Godfrey Hodgson, *All Things to All Men: The False Promise of the Modern American Presidency* 239 (1980). As a result, the Presidency's most precious commodity is time, and one of the most vexing problems for the President and his staff is how to divide that time among the disparate issues that call for his attention. Deadlines "rule [the President's] personal agenda," and the President typically faces "deadlines enough to drain his energy and crowd his time regardless of all else." Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* 130 (1990).

Throughout the country's history, Presidents have remarked upon the overwhelming burdens of the Presidency. Our first President, George Washington, wrote that "[t]he duties of my Office * * * at all times * * * require an unremitting attention." Arthur B. Tourtellot, *The Presidents on the Presidency* 348 (1964). President Jefferson explained that his duties "enjoin[ed] his constant agency in the concerns of 6 millions of people," and that even during his annual vacation, "the public business * * * goes on as unremittingly." 3 Philip B. Kurland & Ralph Lerner, *The Founders' Constitution* 530-531 (1987). President John Quincy Adams said that he could "scarcely conceive a more harassing, wearying, teasing condition of existence." Tourtellot, *supra*, at 349. President Polk complained that "[t]he public have no idea of the constant accumulation of business requiring the President's attention." Finer, *supra* at 36. President Benjamin Harrison observed that "it is a rare piece of good fortune during the early months of an administration if the

President gets one wholly interrupted hour at his desk each day." Tourtellot, *supra*, at 360. President Theodore Roosevelt noted that "[e]very day, almost every hour, I have to decide very big as well as very little questions." *Id.* at 361. President Taft noted that "[o]ne trouble is no sooner over in this office than another arises." *Id.* at 363. President Wilson stated that "the amount of work a President is supposed to do is preposterous" and concluded that "[m]y work can be properly done only if I devote my whole thought and attention to it and think of nothing but the immediate task at hand." *Id.* at 365.

In the modern era of United States leadership as a world power, the responsibilities noted by earlier Presidents have only increased. President Truman concluded that "the pressures and complexities of the Presidency have grown to a state where they are almost too much for one man to endure." Finer, *supra*, at 37. President Eisenhower observed that "the duties of the President are essentially endless. No daily schedule of appointments can give a full timetable—or even a faint indication—of the President's responsibilities. Entirely aside from the making of important decisions, the formulation of policy through the National Security Council, and the Cabinet, cooperation with the Congress and with the States, there is for the President a continuous burden of study, contemplation and reflection." Tourtellot, *supra*, at 372-373. President Lyndon Johnson recounted that "[o]f all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a.m., and there were few mornings when I didn't wake up by 6 or 6:30." Lyndon B. Johnson, *The Vantage Point* 425 (1971).

The unceasing nature of the President's duties is reflected in the constitutional structure of his office. In contrast to the Congress, which is required to assemble only "once in every Year" (Const. Art. I, § 4) and which

may adjourn on a regular basis (*id.* § 5), the President must attend to his duties as Chief Executive and Commander-in-Chief continuously throughout his tenure.[5] The Twenty-Fifth Amendment, with its elaborate machinery for carrying out the President's functions when he "is unable to discharge the powers and duties of his office," confirms that constitutional imperative. The sponsors of the Twenty-Fifth Amendment stressed the need to ensure "that there will be a President of the United States at all times * * * who has complete control and will be able to perform all the powers and duties of his office." 111 Cong. Rec. 15,595 (1965) (Sen. Bayh). In the words of one of the Amendment's principal sponsors, "this Nation cannot permit the Office of the President to be vacant even for a moment." *Presidential Inability: Hearings before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965) (Rep. Celler).[6]

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[5] Responding to the argument that a sitting President enjoys no immunity from the processes of the courts, President Jefferson stated that "[t]o comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function." Kurland & Lerner, *supra*, at 530.

[6] Witnesses who testified before Congress in support of the Twenty-Fifth Amendment were equally emphatic about the dangers of any interruption in the exercise of the President's powers. Clinton Rossiter, a noted Presidential scholar, stated that "an uninterrupted * * * exercise of the full authority of the Presidency" was "[p]erhaps the most pressing requirement of good Government in the United States today," and former Attorney General Herbert Brownell stated that the Nation's "very survival * * * may rest upon the capacity of the Nation's Chief Executive to make swift and unquestioned decisions in an emergency." *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 134-135, 214 (1964).

A sitting President cannot adequately defend himself against litigation seeking to impose personal financial liability without diverting his time and attention from the exercise of the "executive Power" under Article II. As a result, a court that compelled the President to participate as a party in the defense of a civil suit during the President's term of office would place itself in the position of "impair[ing] another [branch] in the performance of its constitutional duties." *Loving*, 116 S. Ct. at 1743. The Constitution does not permit that result.

B. This Court's decision in *Fitzgerald*, *supra*, supports the proposition that the maintenance of private suits against a sitting President would trench impermissibly on the Presidential office under Article II. In *Fitzgerald*, this Court held that the President is entitled to absolute immunity from claims for damages "for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. The Court characterized that immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.[7]

The Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages based on his official conduct. 457 U.S. at 751-754. To expose the President to suits for damages based on his official actions, the court reasoned, could deprive him of

[7] The Court discussed in some detail historical precedents regarding the susceptibility of sitting Presidents to judicial process. See 457 U.S. at 751-752 n.31. The Court noted, *inter alia*, that such early Americans as John Adams, Thomas Jefferson, Oliver Ellsworth and Joseph Story believed the President not to be subject to judicial process. *Id.* at 751 n.31. The Court concluded that "[t]he best historical evidence clearly supports" a rule of absolute immunity for a President's official actions. *Id.* at 752 n.31.

" 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752. The Court observed that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. In his concurring opinion, Chief Justice Burger also noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763.

When the President is sued for actions wholly unrelated to his official responsibilities, *Fitzgerald*'s concern for ensuring "fearless[] and impartial[]" Presidential decision making is not directly implicated. The more general concerns underlying this Court's holding, however, apply with equal force. *Fitzgerald* recognizes that "[t]he President occupies a unique position in the constitutional scheme," 457 U.S. at 749; that the President should not be diverted from attending to the national welfare by "concern with private lawsuits," *id.* at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs, *id.* at 754 n.37. As explained above, the President would be faced with a "diversion of his energies by concern with private lawsuits," *id.* at 751, if he were compelled to defend himself against a private suit for damages during his term in office. That diversion would "raise unique risks to the effective functioning of government." *Ibid.* The teaching of *Fitzgerald* is that the judicial system should not lend itself to such risks.[8]

[8] A similar lesson can be drawn from the evident immunity of a sitting President from criminal prosecution. The available evidence strongly indicates that the Framers did not contemplate the possibility

C. The court of appeals read *Fitzgerald* to mark the outer limit of Presidential immunity. Pet. App. 8-9. In the court's view, "[t]he [Supreme] Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion * * * that beyond this outer perimeter there is still more immunity waiting to be discovered." *Id.* at 9. Because the instant case involves claims that are (with one possible exception, see note 3, *supra*) beyond "the 'outer perimeter' of [the President's] official responsibility," *Fitzgerald*, 457 U.S. at 756, the court of appeals concluded that *Fitzgerald* precluded the recognition of any constitutionally grounded immunity here. Pet. App. 9. And because the court of appeals believed that the President "is entitled to immunity, if at all, only because the Constitution ordains it," *id.* at 16, the court regarded *Fitzgerald* as dispositive of the question whether a sitting President may be compelled to defend against a private lawsuit during his service in office.

The court of appeals erred in asserting that deferral of litigation until the President leaves office would "extend[] presidential immunity beyond the outer perimeter delineated in *Fitzgerald*." Pet. App. 9. The plaintiff in *Fitz-*

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that criminal prosecutions could be brought against a sitting President. See, *e.g.*, 2 Max Farrand, *Records of the Federal Convention of 1787*, at 64-69, 500 (New Haven 1911); *The Federalist* No. 69, at 416 (Hamilton) (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office: and would *afterwards* be liable to prosecution and punishment in the ordinary course of law") (emphasis added). As the Court noted in *Fitzgerald*, "there is a lesser public interest in actions for civil damages than * * *in criminal prosecutions." 457 U.S. at 754 n.37. In *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

gerald did not name former President Nixon as a defendant until nearly four years after the conclusion of his Presidency. See 457 U.S. at 740. The case therefore did not implicate—and the Court accordingly did not discuss—the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit. Rather, the Court focused on the danger that the President's willingness to discharge his official duties "fearlessly and impartially," *id.* at 752, might be impaired by the prospect of *future* suits for damages based upon the performance of those duties, see *id.* at 751-753 & n.32. The burdens imposed by the litigation process pose a *different* threat to the Presidency than that which concerned the Court in *Fitzgerald*, but the threat is no less real. Nothing in *Fitzgerald* suggests that those burdens should be deemed insubstantial where the President is sued during his term of office.[9]

The temporary deferral of litigation sought by the President here, moreover, is far less burdensome to potential plaintiffs than is the absolute immunity recognized in *Fitzgerald*. Under *Fitzgerald*, even a plaintiff whose most basic legal rights have been deliberately violated by the President acting in his official capacity may be permanently foreclosed from obtaining redress in the courts.

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[9] In the context of suits against subordinate executive branch officials, this Court has consistently recognized that "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). That concern applies with particular force to the President of the United States. Cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.").

Deferring the instant suit until the conclusion of the President's service, by contrast, affects only the timing of the litigation. However the issue currently before this Court is resolved, respondent will ultimately be afforded an opportunity to prove her claims, and to obtain relief if those claims are found to be meritorious.

Thus, the deferral of litigation sought here does not, as the court of appeals believed, extend "beyond" the immunity recognized in *Fitzgerald*. It is simply a different form of relief designed to prevent a different form of encroachment on the President's ability to perform his constitutional functions. There can, moreover, be no doubt that the burden on the plaintiff imposed by *Fitzgerald*'s rule of absolute immunity for official acts is far greater than the burden that would be imposed by the stay sought here. Thus, while the permanent immunity recognized in *Fitzgerald* is limited to "acts within the 'outer perimeter' of [the President's] official responsibility," 457 U.S. at 756, *Fitzgerald* in no way forecloses the temporary deferral of litigation sought by the President in this case. To the contrary, as explained above, *Fitzgerald*'s reasoning directly supports that accommodation of the public and private interests involved.

The reasoning of the court of appeals is also flawed by the court's erroneous premise that official immunity is confined to cases in which "the Constitution ordains it." Pet. App. 16. This Court has made clear that official immunity need not be grounded directly in the Constitution. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 497 (1978) ("the doctrine of official immunity from § 1983 liability * * * [is] not constitutionally grounded"); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Fitzgerald*, 457 U.S. at 747 ("Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history,"

and "[t]his Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government."). *A fortiori*, no direct constitutional mandate is required for the more limited kind of accommodation at issue in this case, which defers rather than denies a plaintiff's opportunity to pursue his or her claims in court. Thus, even if Article II and separation of powers principles did not compel the postponement of private suits against sitting Presidents *ex proprio vigore*, the overriding public interest in the President's performance of his official duties would support the deferral of private civil litigation until the conclusion of the President's service in office.

II. PRIVATE SUITS AGAINST A SITTING PRESIDENT SHOULD BE STAYED UNTIL THE PRESIDENT LEAVES OFFICE

A. The power to stay civil proceedings is a basic and long-settled judicial power. Over a half-century ago, this Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936). The Court recognized in *Landis* that "[o]ccasions may arise when it would be a 'scandal to the administration of justice' * * * if power to coordinate the business of the court efficiently and sensibly [by staying proceedings was] lacking altogether." *Id.* at 255.

The courts and Congress have recognized a variety of contexts in which the public interest may require a stay of civil litigation. For example, a postponement or stay may be appropriate during the pendency of administrative proceedings (see, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 765 n.13 (1979); *Ricci* v. *Chicago Mercantile*

Exch., 409 U.S. 289, 306-307 (1973)), criminal proceedings (see, *e.g.*, 21 U.S.C. 881(i); *Koester* v. *American Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993); *United States* v. *Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976); 2 Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* § 8:07 (1986)), arbitration proceedings (*Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983)), bankruptcy proceedings (11 U.S.C. 362; *Hill* v. *Harding*, 107 U.S. 631, 634 (1882); cf. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989) (FSLIC receivership)), or state court proceedings (*Heck* v. *Humphrey*, 114 S. Ct. 2364, 2373 n.8 (1994); *Harris County Comm'rs Ct.* v. *Moore*, 420 U.S. 77, 83 (1975); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964)). Similarly, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 501 *et seq.*, provides for federal and state courts to grant stays in suits involving persons in military service in specified circumstances, 50 U.S.C. App. 521. See, *e.g.*, *Semler* v. *Oertwig*, 12 N.W.2d 265, 270 (Iowa 1943); *Coburn* v. *Coburn*, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982).[10] The postponement of litigation in any of these circumstances may be as long as or longer than a President's term in office. Congress and the courts have thought this result justified, however, because of the weight of the public policies supporting a stay.

Staying a private suit until the conclusion of the President's term of office forestalls the "intrusion on the authority and functions of the Executive Branch," *Fitzgerald*, 457 U.S. at 754, that would result if the President

[10] Although we understand that the President does not claim relief under this statute, see Pet. Reply to Br. in Opp. 8 n.5, it demonstrates—like the other examples cited in text—that reasons of public policy may in certain circumstances require postponement of civil litigation.

were required to divert his attention to the task of defending himself against personal liability and submit his schedule to the control of a coordinate Branch. At the same time, staying the suit preserves the plaintiff's right to seek relief for a meritorious claim. It affects only when, not whether, the President must answer the allegations; it merely delays, rather than defeats, the vindication of the plaintiff's private legal interests. It is thus far less burdensome for plaintiffs than the absolute immunity from liability recognized in *Fitzgerald*.[11]

There is no reason to expect, at least as a general matter, that staying litigation will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims. If the circumstances of a particular case suggest an unusual risk that specific evidence will be lost—for example, if the case requires the testimony of an extremely ill witness—arrangements can be made to preserve that evidence without allowing a more general commencement or resumption of the litigation. Cf. Fed. R. Civ. P. 27(a), 27(c) (perpetuation of testimony).

Special concerns regarding the impact of a stay might be raised by private claims that seek immediate equitable relief, such as suits to enjoin ongoing unlawful conduct that is wholly unrelated to the President's official duties. In that context, there may be less assurance that a plaintiff's interests would be adequately protected if resolution of the suit were deferred until the President left office. But even if it could be shown that staying a

[11] A stay is preferable to dismissal without prejudice because a dismissal, unlike a stay, creates a risk that the limitations period will run before the suit is refiled. See, *e.g.*, *Wilson* v. *Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir. 1988); cf. *Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137, 2143 n.2 (1995); *Deakins* v. *Monaghan*, 484 U.S. 193, 202-203 & n.7 (1988).

particular lawsuit would seriously prejudice the plaintiff's interests, it would not necessarily follow that the litigation should be allowed to proceed while the President is in office. Where the public and constitutional interest in the President's unimpaired attention to his duties conflicts with the purely private interest of a plaintiff in obtaining immediate relief, the private interest must yield. See *Fitzgerald*, 457 U.S. at 754 n.37.

This Court need not decide, however, whether a plaintiff's interest in immediate relief could ever justify denying the President a stay during his term of office. It may be assumed, *arguendo*, that in truly extraordinary circumstances a stay would not be required. Whatever the scope of such an exception might be, it plainly would not extend to suits like this one, in which the plaintiff seeks only monetary relief. When a plaintiff seeks damages for alleged past misconduct, mere delay is highly unlikely to vitiate the relief.

The court of appeals appears to have believed that granting the President a stay would impermissibly place him "above the law." See Pet. App. 6 ("the President * * * is subject to the same laws that apply to all other members of our society"; "Article II * * * did not create a monarchy"). That objection disregards the temporary nature of the relief sought by the President. As noted above, a stay does not insulate the President from legal responsibility for his private actions; it merely affects the timing of the proceedings in which his liability is determined. A stay leaves the President as an individual subject to the same laws as other citizens, while protecting the vital public interest in his effective exercise of the "executive Power" of the United States.

The court of appeals also believed that a stay would infringe the constitutional right of plaintiffs to have access to the courts. Pet. App. 10, 17, 20-21. The statutory

and common law causes of action asserted here, however, may be subjected to procedural requirements and limitations designed to protect countervailing public interests. Moreover, because a stay affects only the timing of the litigation, the plaintiff's asserted constitutional interest is protected.[12] In this regard, we note that while the Bill of Rights guarantees the right to a speedy trial in criminal cases, see U.S. Const. Amend. VI, it lacks a similar guarantee for civil litigation.[13]

B. In contrast to the court of appeals, the district court held that the President is entitled to "temporary or limited immunity from trial." Pet. App. 70.[14] The district court declined to stay pretrial proceedings, however, allowing discovery to go forward "as to all persons including the President himself." *Id.* at 71. That disposition is incorrect.

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[12] As *Fitzgerald* demonstrates, in appropriate circumstances, the constitutional demands of the President's office may require a plaintiff to forfeit his or her right to legal redress altogether. If permanent immunity from liability does not offend the constitutional right of access to the courts, then, *a fortiori*, neither does the temporary deferral of litigation at issue in this case.

[13] The concurring opinion below is similarly mistaken in suggesting (Pet. App. 17) that a stay of the litigation would infringe the plaintiff's Seventh Amendment right to trial by jury. The Seventh Amendment addresses the question of who will decide contested issues of fact, not when such issues will be decided. See *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 23 (1899) (Seventh Amendment "does not prescribe at what stage of an action a trial by jury must * * * be had").

[14] The district court's stay of trial proceedings covered the claims against Ferguson (see pages 2-3, *supra*) as well as those against the President. See Pet. App. 71. The court concluded that the stay should extend to Ferguson because the claims against him are "integrally related to the allegations against the President." *Ibid.* The United States agrees with that conclusion.

The touchstone of constitutional analysis in this case is the conflict between the demands of the litigation process and the President's attention to the duties of his office. Pretrial discovery is a primary source of that conflict. The discovery process often lasts far longer, and consumes far more of the parties' time and attention, than the eventual trial. For a sitting President, the discovery burden would be most prominent with respect to his own deposition, and whatever other discovery requests might be presented to him. The President would also be required to work closely with his attorneys on other discovery matters, such as identifying potential sources of discovery on the President's own behalf. The President's interests as defendant could not be adequately served during the discovery process without a substantial commitment of time and effort on his part, a commitment that could only come at the expense of his official duties.

The district court's failure to take account of those burdens is directly at odds with this Court's precedents regarding official immunity. Immunity is intended not only to insulate officials from the chilling effect of potential liability for government decisions, but also "to spare a defendant * * * unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," including the demands of the discovery process. *Siegert*, 500 U.S. at 232; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (same); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982) (same). Concern over the disruptive effects of pretrial discovery is a principal reason that courts resolve disputed questions of immunity at the earliest possible point, before discovery is allowed to take place. See *Siegert*, 500 U.S. at 232; *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818 (until the "threshold immunity question is resolved, discovery should not be allowed."). It is also one of the reasons why orders denying motions to dismiss on

immunity grounds are immediately appealable. See, *e.g.*, *Mitchell*, 472 U.S. at 524-530. The law of official immunity thus reflects the recognition that pretrial discovery subjects public officials to serious and intrusive burdens. The significance of those burdens, and the need to avoid them, are at a constitutional zenith when the official in question is the President of the United States.

To be sure, on several occasions, sitting Presidents have given evidence as witnesses in federal criminal cases by means of depositions and interrogatories, while declining to attend (or being excused from attending) court to testify in person.[15] We know of no instance, however, in

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[15] We are not aware of any instance in which a sitting President has been compelled to testify at a trial, civil or criminal. President Jefferson was subpoenaed in *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), but the subpoena was directed only to documents. The President insisted that he was supplying the documents voluntarily, and he redacted portions of a subpoenaed letter that he determined should be kept confidential. See 11 *The Writings of Thomas Jefferson* 228, 363-366 (A. Lipscomb ed. 1904); *United States* v. *Burr*, 25 F. Cas. at 193. President Monroe was served with a subpoena to testify at a court martial. Based on the Attorney General's advice, however, he advised the court that he could not appear because his official duties were paramount. Although he stated that he would consent to a deposition, the court instead submitted interrogatories, which he answered. See Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote*, 1975 U. Ill. L.F. 1, 5-6. President Grant initially volunteered to testify at a criminal trial of a former aide, but, after consulting with his staff, he chose to give a deposition instead. *Id.* at 3. President Nixon was ordered to produce tapes from his office in response to subpoenas *duces tecum* upon the government's showing of a "demonstrated, specific need for evidence in a pending criminal trial." *United States* v. *Nixon*, 418 U.S. 683, 713 (1974). President Ford was ordered to and did give a deposition for the criminal trial of Lynette (Squeaky) Fromme. See *United States* v. *Fromme*, 405 F. Supp. 578, 580-583 (E.D. Cal. 1975). Most recently, President Clinton has given videotaped testimony in

which a sitting President has been compelled to furnish evidence in connection with a civil proceeding.[16] In any event, the burden of full-scale pretrial discovery for the President as defendant would be greater than the burden imposed on him as a non-party witness. As a result, the historical examples of sitting Presidents giving evidence as witnesses in criminal cases do not support the district court's decision to subject the President to full pretrial discovery in a civil case where the President himself is the defendant.[17] The district court's insistence on allowing pretrial discovery "as to all persons including the President himself" is therefore an unduly intrusive solution that subjects the President and his office to constitutionally inappropriate burdens.

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connection with ongoing criminal prosecutions relating to the Whitewater affair. See *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (order providing for President's videotaped testimony); *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996).

[16] Testimony of *former* Presidents has been sought in several criminal and civil proceedings. Former President Nixon was deposed in *Fitzgerald* and in *Halpern* v. *Kissinger*, 401 F. Supp. 272 (D.D.C. 1975). Former President Reagan gave a videotaped deposition in *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990). Former President Bush moved to quash a subpoena for testimony in a criminal proceeding in 1993, but the motion became moot when the defendant entered a guilty plea. *See United States* v. *Drogoul*, No. 1:91-CR-78-1-GET (N.D. Ga. order filed Sept. 21, 1993).

[17] The production of evidence at a criminal trial has constitutional dimensions, since the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." See *United States* v. *Nixon*, 418 U.S. 683, 711 (1974). A plaintiff in a civil action can assert no comparable constitutional entitlement. Cf. *Fitzgerald*, 457 U.S. at 754 n.37 ("there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions").

C. Rather than permitting this litigation to be stayed, the court of appeals endorsed the alternative of "judicial case management." Pet. App. 13. The court of appeals called on the district court to exercise its discretion to avoid scheduling conflicts that would "thwart the President's performance of his official duties," and professed "every confidence" that the district court would do so. *Id.* at 13-14. At the same time, the court of appeals indicated that only "specific, particularized, clearly articulated presidential duties" would suffice to invoke the district court's scheduling discretion. *Id.* at 16. And the court stated its expectation that the district court would "move forward with * * * reasonable dispatch," "without impeding [petitioner's] right to have her claims heard without undue delay." *Id.* at 13-14, 16.

The court's reliance on "case management" to protect the office of the President is wholly misconceived. The court of appeals assumed that the President is free to turn his attention to private litigation whenever he is not occupied by "specific, particularized, clearly articulated presidential duties," Pet. App. 16, and hence that a court need only schedule litigation events to coincide with the President's free time. As explained above, however, the demands placed on the President are unceasing. See pages 10-13, *supra*. The President's superintendence of the Executive Branch requires that decisions regarding the relative priority to be given to diverse matters, and the amount of Presidential time and attention to be devoted to each of them, will be made by the President and by persons acting under his direction and control. Even during periods of time when no specific task occupies the President's agenda, moreover, "there is for the President a continuous burden of study, contemplation and reflection." Tourtellot, *supra*, at 372-373 (quoting President Eisenhower). The continuing distraction created by a

lawsuit seeking to impose substantial financial liability poses a significant threat to the President's unhindered performance of his official responsibilities.

The court of appeals' directive that this lawsuit should go forward necessarily impairs the President's authority to fashion an appropriate balance among the various demands of the office. Reliance on judicial case management, moreover, would necessarily enmesh the courts in an ongoing oversight of the President's schedule over a potentially extended period of time.[18] The process of case management envisioned by the court of appeals would disserve the interests of the judiciary as well as those of the President, by requiring the district court to undertake a politically charged inquiry into the relative importance of diverse Presidential activities—an inquiry for which no judicially manageable standards exist. The problem is compounded by the fact that the President may not be at liberty to provide the kind of "specific, particularized, clearly articulated" showing contemplated by the court of appeals. Particularly where sensitive matters of foreign affairs and national security are involved, the President may not be free to identify the issues that demand his attention. Indeed, precisely at moments of greatest crisis, it may be imperative for the President to convey the impression that nothing is amiss. A scheme that requires the President to identify and justify the official demands on his time to another Branch of government cannot accommodate those concerns.

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[18] President Jefferson long ago noted the threat to separation of powers posed by subjecting the President to civil process during his term of office: "But would the executive be independent of the judiciary * * * if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?" Kurland & Lerner, at 530-531; see *Fitzgerald*, 457 U.S. at 751 n.31.

Finally, reliance on case management potentially subjects sitting Presidents to broad and possibly inconsistent exercises of discretion by state and federal trial judges across the country. Even within the confines of the federal system, it is questionable how readily such exercises of discretion can be overseen by appellate courts.[19] Moreover, federal courts have no readily available means of correcting erroneous exercises of discretion by state courts. Yet the exercise of jurisdiction by state courts over a sitting President would pose risks to the integrity of the President's office at least as great as, if not greater than, the risks arising from comparable exercises of jurisdiction by the federal courts. If state courts were free to proceed with private suits against sitting Presidents, cases might arise in which local antipathy to the President could adversely influence the exercise of judicial discretion.[20]

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[19] The court of appeals suggested that "[i]f either party believes the [district] court is failing to discharge [its] responsibility, the proper course is to petition this Court for a writ of mandamus or prohibition." Pet. App. 16. As a general matter, however, extraordinary writs have severely limited scope in cases involving the exercise of discretion by district courts. See, *e.g.*, *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 665-666 & n.7 (1978) (plurality opinion).

[20] If this Court holds that the instant suit can go forward during the President's term of office, it is not clear whether a sitting President would have any remaining defense against being required to participate in suits in state court for acts unrelated to his official duties. On the one hand, Supremacy Clause principles might plausibly be thought to impose an independent barrier to the adjudication of such a suit. Cf. *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976) ("Supremacy Clause requires that federal functions "'be left free' of [state] regulation," particularly "where * * * the rights and privileges of the Federal Government at stake * * * find their origin in the Constitution"); *Feldman* v. *United States*, 322 U.S. 487, 491 (1944) ("[T]he

Even the court of appeals recognized that the instant lawsuit should be adjudicated in a manner "sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. Thus, the question is not whether respondent's interest in prompt resolution of her claims must be balanced against countervailing public and governmental concerns. The question is how the competing interests can best be reconciled. The court of appeals' approach would enmesh the district court in a politically charged, and potentially extended, oversight of the President's schedule, to the likely detriment of both the President and the court. A stay would avoid that intrusion on the President's conduct of his official duties, while preserving respondent's ability to obtain redress if her claims are ultimately found to have merit.

The Founders understood "Energy in the executive" to be an essential feature of "good government," and they intended the "structure and powers of the executive department" to assure to the President "all the requisites to energy." *The Federalist* No. 70, at 423 and No. 77, at 463 (Hamilton) (C. Rossiter ed. 1961). Subjecting the President to the indefinite and unpredictable demands of civil litigation during his term in office, and submitting the management of his schedule to the superintendence of another Branch of government, would contradict the Founders' design and frustrate their purpose.

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sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."). On the other hand, there is no readily apparent statutory basis for removal of such a suit to federal court in the absence of some ground of federal jurisdiction independent of the President's official status. Cf. *Mesa* v. *California*, 489 U.S. 121 (1989) (construing federal officer removal statute, 28 U.S.C. 1442(a), to authorize removal only where officer asserts a colorable federal defense).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 95-1853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM JEFFERSON CLINTON,

Petitioner,

v.

PAULA CORBIN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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In The

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William Jefferson Clinton,

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief Amicus Curiae of Law Professors In Support of Petitioner

Interests of Amici Curiae

The law professors named below teach and write about constitutional law. This brief sets forth their considered view from a scholarly perspective on the issue central to this case: whether the office of the Presidency should be presumptively protected from the distraction and diversion of energy caused by the pursuit of civil litigation against the President during his term of office. This brief does not speak to any other issue in this case

nor does it in any way address the merits of respondent's complaint. Amici join this brief solely on their own behalf and not as representatives of their universities.

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Counsel for both parties have consented to the filing of this brief; their stipulation to that effect has been lodged with the Court.

SUMMARY OF ARGUMENT

This case presents a narrow issue: whether "our constitutional heritage and structure," *Nixon v. Fitzgerald*, 457 U.S. 457 U.S. 731, 748 (1982), calls for a temporary delay of civil litigation against a sitting President when the cause of action arises out of alleged acts done in his non-presidential capacity well before he ever took office and the plaintiff cannot show a compelling exigency that requires the litigation to proceed immediately. This case does not raise any question of permanent immunity for non-official acts. The only question is whether the proceedings should be temporarily delayed.

Amici respectfully submit that such a delay is appropriate. A limited and temporary immunity from suit for unofficial acts is fairly implied in the structure of the executive branch established in Article II of the Constitution and in traditional principles of separation of powers. The solitary nature of the Presidency necessitates that the person occupying that office be free from the diversion of energy and distraction from duty that defending such a private damages action would cause. *See Fitzgerald*, 457 U.S. at 753. Furthermore, such temporary immunity is consistent with a long tradition of judicial avoidance of incursions upon the Presidency. Where, as here, the actions alleged long predated accession to the Presidency, and where, as here, there has been no showing of exigent need for immediate relief, there is no reason to override the structural considerations warranting temporary immunity.

ARGUMENT

This case presents the question whether a private civil action for damages, stemming from alleged actions predating and outside the Presidency, should be temporarily delayed during the President's tenure in office. Amici argue that it should be, so long as the plaintiff can show no compelling need for immediate relief.

At the outset, it is important to note the very narrow question before the Court. This case does not raise a claim of immunity from liability. As to the scope of presidential immunity from damages, this Court's decision in *Nixon v. Fitzgerald* inferred from Article II and the separation of powers an absolute Presidential immunity "from damages liability predicated on his official acts." 457 U.S. at 749. But this case involves solely non-official acts, and there is no claim that the presidency shields petitioner from liability on respondent's claims.

Additionally, this case raises no claim of permanent immunity for non-official acts. The President is not above the law, *see, e.g., United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."), and no one claims that he is. The only issue here is whether constitutional structure and separation-of-powers principles call for a *temporary* postponement of civil litigation until after the President leaves office. Everyone agrees that the action can proceed at that time.

Finally, this case does not raise the question whether exceptional exigent circumstances, as demonstrated in a court of law, might justify allowing a civil action to

proceed against the President even during his term in office. It may be that discovery or other proceedings should be allowed to go forward if there is a compelling need for immediate relief. No such need has been shown here. Thus, the only question presented here is whether a private plaintiff, with no special showing, can compel a sitting President to defend a civil action against him during his term in office. Amici respectfully suggest that the answer to that question should be "no."

I. TEMPORARY PRESIDENTIAL IMMUNITY FROM PRIVATE SUITS IS FAIRLY IMPLIED IN ARTICLE II AND IN TRADITIONAL PRINCIPLES OF SEPARATION OF POWERS

The Constitution nowhere specifies what immunities a sitting President should enjoy, but this Court has long recognized that "a specific textual basis has not been considered a prerequisite to the recognition of immunity." *Nixon v. Fitzgerald*, 457 U.S. at 750 n.31; *see also United States v. Nixon*, 418 U.S. at 705-06 n.16 (noting that "the silence of the Constitution [on executive privilege and immunity] is not dispositive"). The Court has inferred presidential privileges and immunities from the unique position of the President set forth in Article II of the Constitution and from the fundamental structural principle of the separation of powers.

Nixon v. Fitzgerald illustrates the Court's method. In *Fitzgerald*, the Court looked to "history and policy" as well as to constitutional text and structure. 457 U.S. at 748. In concluding that the President was entitled to absolute immunity from civil damages for official acts,

the Court stated that "[w]e consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749. The Court reasoned in part from the functional necessities of the President's unique responsibilities under Article II, and in part from the principle that no branch should be subject to crippling incursions by another branch. This sort of structural reasoning has a venerable pedigree in our constitutional law. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *see generally* Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969). Such structural reasoning is especially relevant to the issue of temporary immunity.

A. Presidential Duties Under Article II

"The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. at 749. Article II, § 1 of the Constitution vests the entire "executive Power" in the President. No other branch of government is entrusted to a single person. "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. The President is Commander in Chief, and he alone is charged with the appointment power, the treaty power, and the duty to "take Care that the Laws be faithfully executed." Article II, §§ 2 & 3. The President is the only officer in the government so vital that the mechanism for his or her succession is constitutionally prescribed, even in the

event of his or her temporary incapacity. U.S. Constitution, Amend. XXV, §§ 3-4.

As two commentators recently described the President's unique position:

> Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed.

Akhil Amar & Neal Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev 701, 713 (1995).

At least since *McCulloch v. Maryland*, it has been well established that "'that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant.'" *United States v. Nixon*, 418 U.S. at 706 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)). In other words, "[c]ertain powers and privileges flow from the nature of enumerated powers ...." *Id.* at 705. Accordingly, Justice Joseph Story long ago concluded that the grant of executive power in Article II "necessarily" carried with it some privileges and immunities essential to make the office function:

> There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them.... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

3 J. Story, *Commentaries on the Constitution of the United States* § 1563, pp.418-19 (1st ed. 1833), cited with approval in *Nixon v. Fitzgerald*, 731 U.S. at 749.

Following Justice Story, the Court in *Fitzgerald* fashioned an immunity to enable the President to "discharge the duties of his office." Specifically, the Court recognized an absolute and permanent immunity from civil liability for official acts. This immunity applies even if a President maliciously abuses his or her official powers and continues even after he or she has left office. Obviously, this is strong medicine. The absolute and permanent protection of the President is accomplished at the cost of an absolute and permanent sacrifice of the plaintiff's interest. This extraordinary result was justified by twin rationales.

One rationale was the need to avoid inhibiting Presidential decisionmaking. Because the threat of civil liability might render the President "unduly cautious," *id.* at 752 n.32, absolute immunity was granted to guarantee that the President had "'the maximum ability to deal

fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). Obviously, this rationale applies only to the President's official acts. It has no application to a claim of immunity from suit for acts committed outside the scope of office.

The other rationale, however, is directly applicable. The *Fitzgerald* Court recognized absolute immunity in order to prevent the distraction from duty that would ensue from *any* litigation against the President. "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. For the *Fitzgerald* Court this concern was made particularly acute by the risk that the President's "sheer prominence" would make him an "easily identifiable target" for civil suits. *Id.* at 752-753.

The *Fitzgerald* Court's concern to prevent diversion of energy and distraction from duty is, of course, fully implicated by suits for non-official acts. Here, as in *Fitzgerald*, permitting the lawsuit to go forward during the President's term of office would impair his ability to discharge his duties under Article II. "We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time ...." Amar & Katyal, *supra*, 108 Harv. L. Rev. at 713. And here, as in *Fitzgerald*, permitting the lawsuit to go forward would risk making the President a litigation magnet for an ever-proliferating variety of civil suits.

It is true, of course, that the *Fitzgerald* Court regarded both rationales as essential for the absolute and permanent immunity there granted. For that reason, absolute immunity was limited, as the Eighth Circuit repeatedly emphasized, to the President's official acts. That is as it should be. But it does not follow that *no* immunity is available for non-official acts. The *Fitzgerald* Court's concern to protect the "fearless and impartial" discharge of the President's duties may have been crucial in justifying an absolute and permanent immunity for official acts, but the equally important concern to prevent diversion of energy and distraction from duty is sufficient to justify a temporary stay of suits for non-official acts. As Justice Story put the point, it is the President's "*person*" and not merely his job that must be "deemed, in civil cases at least, to possess an official inviolability." Only if the President's "person" is undistracted and undiverted can he or she carry out the unique duties imposed by Article II.

Thus the structural reasoning of *Nixon v. Fitzgerald* supports a temporary Presidential immunity for civil litigation even for claims based on private conduct. As the Court observed in *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977) (citations omitted), "[t]o the extent that [presidential] privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege."

B. Separation of Powers

Nixon v. Fitzgerald also reasoned that the balance of power between the Executive and the Judiciary would be upset if the President could be targeted for civil damages during his term in office:

> Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege, we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution."

457 U.S. at 753 (quoting *United States v. Nixon*, 418 U.S. at 708, footnotes omitted). The separation of powers embodied in the Constitution counsels judicial deference to the Executive unless there are strong countervailing interests.

Nixon v. Fitzgerald also relied in part on historical evidence suggesting that "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31. President John Adams and Senator Oliver Ellsworth were reported by Senator Maclay to have said that "the President, personally, was not subject to any process whatever.... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Journal of William Maclay* 167

(E. Maclay ed. 1890), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

President Thomas Jefferson raised the separation-of-powers issue in his argument against being required to comply with a *subpoena duces tecum* in the treason trial of former Vice President Aaron Burr:

> The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other .... But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

10 *The Works of Thomas Jefferson* 404 n. (Paul L. Ford ed., 1905), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

As it happened, Chief Justice Marshall ruled that Burr's constitutional right to compulsory process overrode any executive privilege President Jefferson might have had. *United States v. Burr*, 25 Cas. 30, 33-34 (C.C.D. Va. 1807). Similarly, in *United States v. Nixon*, the Court held that the presumptive privilege of presidential confidentiality was overridden by a "demonstrated specific need for evidence in a pending criminal trial." 418 U.S. at 713. But neither Chief Justice Marshall in *Burr* nor the Court in *Nixon* suggested that such a balancing of interests was incompatible with a constitutional privilege grounded in the separation of powers.

Indeed, through the years, the courts have struggled to avoid the kind of impasse that might have developed had the *Burr* court sought to hold President Jefferson in contempt. When injunctive relief must issue against the executive branch, it has typically run against an executive official other than the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (enjoining the Secretary of Commerce); *Atlee v. Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972) (dismissing the President as party to suit in which the Secretary of Defense was also named as a party). Rather, the courts have an "apparently unbroken historical tradition" of refusing injunctive relief against the President himself. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia J., concurring in part and concurring in the judgment); *see id.* at 802 (plurality opinion). Courts that do maintain jurisdiction over the President as a party have resorted to declaratory rather than injunctive relief. *See, e.g., National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("We so restrict ourselves at this time in order to show the utmost respect to the office of the Presidency and to avoid, if at all possible, direct involvement by the Courts in the President's constitutional duty faithfully to execute the laws and any clash between the judicial and executive branches of the Government."). And even that limited assertion of judicial authority has been disputed. *See Franklin v. Massachusetts*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in judgment) ("I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.").

If such encroachment of the judiciary upon the Presidency should be avoided in matters of public affairs, it should also be avoided if at all possible in private lawsuits against the President as a private citizen. The tradition of judicial restraint and deference not only avoids intrusion of the judiciary upon the independence of the Presidency, but also avoids the friction of "needless head-on confrontations between district judges and the Chief Executive." *Franklin v. Massachusetts*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). That friction is similarly threatened in private lawsuits against the President, as the Chief Executive is inseparable from the person occupying the office.

C. Absence of a Compelling Countervailing Interest

Article II and the separation of powers thus support a temporary presidential immunity against lawsuits unconnected to official acts. But that is not to say that such immunity would necessarily be absolute. It may well be that the President's right to delay such litigation until after he or she left office could be qualified or overridden on a showing of a compelling need.

That issue need not be resolved in this case, as it is plain that no compelling need for immediate proceedings has been demonstrated here. A civil damage suit such as this one, by definition, involves only discrete, past harms that are reparable, if merit be found, by money damages. Delay in payment can be compensated

by prejudgment interest. A plaintiff might in some case be able to demonstrate an urgent need for injunctive relief against the President, in his personal capacity, to end an ongoing harm. Were a President to fail to abate a nuisance on his private property, for example, neighbors seeking injunctive relief might be able to show that the continuing nature of the nuisance would justify an immediate injunction. But the burden of demonstrating exigency should rest on the plaintiff. Otherwise the President would have to bear the burden of diversion of energy and distraction from duty in order to establish an immunity based on the need to avoid those costs. The only way for a temporary immunity to accomplish its purpose is to make the immunity presumptively applicable in all cases, with exceptions only in those unusual and, on this record, hypothetical circumstances in which there would be a compelling need for immediate relief. If the President's privilege were overcome here, it would be no privilege at all.

II. THE TEMPORARY IMMUNITY SHOULD EXTEND TO DISCOVERY AND OTHER PRETRIAL MATTERS

Unlike the Eighth Circuit, the district court recognized the need for a presumption in favor of temporary immunity but undercut its decision by permitting discovery to proceed. This approach defeats the very purpose of granting temporary immunity. The same functional and separation-of-powers concerns that counsel against subjecting a sitting President to trial likewise counsel against imposing on him the burden of discovery and other pretrial motions. Indeed, the problem is not

merely that discovery can be as burdensome as trial itself; discovery, by design, can be considerably *more* invasive, and can give the plaintiff considerable control over the time and energies of his or her opponent.

Discovery under the Federal Rules of Civil Procedure reaches far beyond admissible evidence. Discovery is not limited to issues raised by the pleadings or by the merits of the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Nor need the information sought through discovery be admissible at trial. Fed. R. Civ. P. 26(b)(1). Discovery is intended to be far-ranging "to allow a broad search for ... any ... matters which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26 advisory committee's note, 1946. Obviously, this intentionally broad nature of the discovery process directly and severely conflicts with the constitutional interest in an unencumbered Chief Executive.

CONCLUSION

It may be that delaying discovery and trial of civil actions based on non-official acts until the President has left office will work some hardship on some plaintiffs. The same is true of all immunities. Compared to the burden on those who complain of official misconduct, however, the burden is rather slight. Those who claim injury resulting from the President's official acts are absolutely and permanently barred from recovery, no matter how egregious the alleged misconduct. Those who claim only injury resulting from the President's non-

official acts are not comparably disadvantaged. At most, they are required to wait a few years until the President has left office or to shoulder the burden of demonstrating a compelling need to proceed at once. This hardship is unfortunate, but it is a necessary and inescapable feature of avoiding the "unique risks to the effective functioning of government" that would be posed by unrestricted civil actions against a sitting President.

Therefore, *amici* urge this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

This case presents a grave question regarding the degree of personal power conferred upon the President of the United States by virtue of his office. *Amici curiae*, the law professors submitting this brief, have published and lectured widely on the subjects of constitutional law in general or on the separation of powers. This brief sets forth their considered views on the issues raised in this case. *Amici* sign this memorandum on their own behalf and not as representatives of their respective schools.

Counsel for both parties have consented to the filing of this brief. Their stipulation to that effect has been lodged with the Court.

STATEMENT

The last several decades have seen a number of sharp conflicts over the relative powers of the President and the government's other branches. Until now, the Executive's arguments have been limited to the assertion of an exclusive right on the part of the President or his subordinates to exercise some official governmental power that might otherwise—and perhaps more properly—be shared by two branches, or be within the sole domain of the legislature or the courts.

The immunity claim in this case is of a new and deeply troubling kind: for the first time, a purely personal privilege is said to attend the office of the presidency. Though the immunity now claimed is characterized as a mere temporal restriction, we believe the argument advanced to support it ignores one of the Constitution's overwhelmingly important goals: to control power. For that reason, the personal immunity claimed cannot be made to fit within the law governing the immunity of federal officials from personal liability for official conduct, or within a coherent view of the relationship between the President's powers and those of the other branches.

SUMMARY OF ARGUMENT

The arguments submitted in support of President Clinton's claim of immunity from suit start with the proposition that the burden is upon the plaintiff to demonstrate that subjecting the President to a suit for purely private conduct[1] will not impose

[1] The bulk of the private conduct at issue here is remote from the President's official functions, because it allegedly occurred before President Clinton entered office. These allegations must be distinguished from the potentially more difficult situation where the acts at issue were committed while the defendant was in office, but were private in the sense that they were unrelated to his performance of presidential duties.

We understand that one count of plaintiff's complaint, for defamation, does relate to actions taken by or on behalf of President Clinton while he was in office. We express no view on the extent to which the actions at issue in this Count are within the outer perimeter of his official duties, as that concept is defined by *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

an excessive burden upon the office of the presidency, or prevent the fulfillment of the President's duties. We submit that this is incorrect, and indeed that the burden is exactly reversed: we believe that this Court's separation of powers jurisprudence allows the President to escape the courts' jurisdiction in a civil action dealing with non-official conduct only if he can demonstrate that the assertion of such jurisdiction will interfere with the fulfillment of the duties of his office. We submit further that he has not made such a showing.

The President and his amici suggest that this burden rests on the plaintiff because she challenges only private conduct—so that there is, so it is said, no public interest in the plaintiff's enforcement of her rights. But we believe strongly that this stands the law, and indeed the entire concept of the rule of law, on its head: there is a compelling public interest in assuring that the law—particularly the Civil Rights Statutes, which enable the people to make real use of essential Constitutional liberties—is enforced uniformly, and that the presidency (or any other public office) is not used as a shield behind which an individual can hide to evade equal justice under the law. To ensure that public office is not so used, every public official seeking exemption from the ordinary course of judicial proceedings has the burden of demonstrating that the particular exemption he or she seeks is necessary to the execution of his or her public duties.

In contrast, President Clinton asserts immunity here not on the basis of any particularized conflict with his executive responsibilities. Rather, he says he is immune from this entire case, and from most other entire cases, merely as an incident of holding office, and for as long as he remains in office. Consideration of other cases that might be filed against a President, all well within the very general rule urged upon this Court by the President, the Solicitor General, and the

President's academic amici, makes clear that the claimed immunity is far too broad. Instead, the courts are empowered to, and should, protect the President from any specific action, such as a discovery or trial demand, that will actually interfere with the performance of his job.

Secondly, the President's personal lawyers—although not, as we discuss below, the Solicitor General—have approached this case as if it were the law that Presidents are immune from suits related to their conduct in office. Passages in the brief of the President's academic amici also lend some support to this proposition. Both the President and his amici, however, move from this premise to what they portray as the next question, namely whether the President is similarly immune from suit related to his private conduct.

The premise, however, is wrong, as the President's amici elsewhere essentially concede. *Nixon v. Fitzgerald* does not hold that the President cannot be sued for his official acts. And in fact, since the Watergate era, a consensus has developed among the lower courts that the President can be sued, while in office, over his official conduct. This amenability to suit even for acts regarding his official duties is a profoundly important mechanism for helping to ensure that the President remains under the law, which defines the scope of his official powers. In allowing this private action to go forward, this Court need not address the question whether the President is amenable to suit, for relief other than damages, for his official conduct. There is certainly no need for this Court to adopt the President's broad characterization of the immunity of his office. We urge this Court not to do so.

Rather than barring suits over the President's acts, *Nixon v. Fitzgerald* simply forecloses one potential remedy—an award of damages against the individual—in such proceedings. It does so for one reason: because the existence of that remedy might distort the President's judgment, preventing him from objectively assessing the factors he must consider as he goes about his duties.

Once it is apparent that *Fitzgerald* is about a particular remedy—personal payment of damages—for allegedly improper ***official*** action, we believe it clear that the case simply does not speak to the question now before this Court. Rather, a correct assessment of President Clinton's immunity claim must be derived from the separation of powers doctrine and specifically from the cases governing the President's amenability to judicial process. Those authorities, we submit, make no room for the President's claim that he is too busy while in office to be held accountable for his personal actions, whether taken while in office or previously. If any immunity is to be created beyond that provided for by existing law (and we perceive the need for none), it is for Congress to declare and respond to that need.

ARGUMENT

I. THE BROAD IMMUNITY FOR WHICH THE PRESIDENT AND HIS AMICI CONTEND WOULD BAR MANY CASES WHERE NO PRESIDENTIAL OR OTHER PUBLIC INTEREST WOULD BE HARMED BY SUBJECTING THE PRESIDENT TO LEGAL PROCESS

Because the President attempts to block this entire case, the immunity claim as presented to this Court is quite categorical. The President's argument is essentially that virtually no cases can go forward that relate to his private conduct or his conduct prior to taking office. In support of this result, he claims that the burden is upon the plaintiff to show irreparable prejudice if consideration of his or her claim were suspended for as long as the President remained in office.

The President's argument would require that he be exempt during his term of office from numerous obligations to which everyone else in the Nation is held, even though there is no compelling reason for such an exemption. If the President

were to default on an ordinary mortgage, for example, we can see no reason why the mortgage holder should be barred from enforcing its rights. They are only financial rights, it is true—and therefore significantly less pressing than the interests at issue in this case. The claim at issue here is also more significant than the situation that would be presented, for example, if a President were to fail to abate a nuisance on real property, with respect to which his neighbors would otherwise be entitled to injunctive relief. Yet the President's argument would bar such an action, as it would also prevent a President's spouse from seeking a divorce and child custody. As discussed below, the separation of powers cases impose upon the President the burden to show that calling him to account on any such matter would actually interfere with the conduct of his office. He does not explain how such a burden would be created by requiring him to defend actions of this kind, though the rule he contends for would bar each such case.

Certainly it would not be an excessive burden for the President's lawyers to file a motion to dismiss, for example, in any of these hypothetical cases, if the complaint were legally deficient. Such a motion would involve only purely legal issues, with respect to which the President's counsel would be able to act without any significant assistance from the defendant himself. If the motion were denied, an Answer—at least to a short complaint like the one filed in this case—would also be no great burden to prepare. Surely fulfillment of this duty cannot reasonably be expected to create an actual impediment to the President's execution of the duties of his office.

As we show in greater detail below, the President may very well be entitled to relief from a particular discovery demand at a particular time, or from a particular demand regarding the conduct or scheduling of a trial. But the law imposes upon the President the burden of demonstrating that he is entitled to any relief from the obligations imposed on any other citizen. This is true, this Court has explained, of the President's obligation to give evidence. *United States v. Nixon*, 418 U.S. 683,

709 (1974) ("the public * * * has a right to every man's evidence" even when that evidence is a confidential official public paper).

The President and his academic amici also suggest that the claim at issue here is less important than other claims might be, (see, *e.g.*, Brief Amicus Curiae of Law Professors at 16) and that requiring the plaintiff to wait up to six more years even to prosecute this claim is not a significant burden. We are surprised by this argument as much as we are convinced that it is wrong. Sexual harassment of the kind alleged here—a willful sexual degradation—affects the emotional well-being of anyone touched by it. There is clearly a strong public interest in enforcing the laws providing redress against such conduct by public officials, as Mr. Clinton was when the acts here at issue allegedly took place. Further, the interests at stake are not only highly important: they are deeply compromised by delay. That the plaintiff chose to remain silent about what she has alleged to have happened to her at the time is no basis for watering down the rights she has left when her anonymity is taken from her by actors totally outside her control.[2]

II. *NIXON v. FITZGERALD* BARS ONLY DAMAGE SUITS RELATED TO A PRESIDENT'S OFFICIAL ACTS, AND IT DOES SO ONLY BECAUSE THE PROSPECT OF PERSONAL LIABILITY FOR OFFICIAL CONDUCT WOULD PREVENT THE PRESIDENT'S OBJECTIVE ASSESSMENT OF THE FACTS HE SHOULD CONSIDER IN CARRYING OUT HIS DUTIES—NOT BECAUSE THE PRESIDENT IS TOO BUSY TO ATTEND TO PRIVATE LAWSUITS

In addition to attempting to shift the burden on this issue from the President to the plaintiff, Mr. Clinton's personal

[2] In making the above arguments, we of course take no position on whether the incidents described by the complaint actually took place.

lawyers have argued as if this Court's holding in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), requires that courts categorically avoid subjecting Presidents to liability for the performance of official duties. This is incorrect. It is essential that *Fitzgerald* be recognized for the narrow decision it is. It bars only a particular remedy. Its analysis is entirely consistent with the other cases discussing the lack of that particular remedy—and the existence of others—in cases charging official misconduct by other, less exalted, officials.

An official's liability to pay damages personally for misconduct while in office is one of the tools that can, under certain circumstances, help ensure that the "official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz v. Economou*, 438 U.S. 478, 489 (1978). "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Id.* at 506.

Whether such an action is permissible against any particular official, this Court has repeatedly made clear, turns on the nature of his or her duties. Thus the Court has adopted what it has called a "functional" approach to the immunity of federal officials for their official misconduct, *Fitzgerald*, 457 U.S. at 746, under which an immunity of "varying scope" is granted to federal officials depending upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

In the application of these principles this Court has recognized the danger that the execution of certain public offices might be disrupted if the prospect existed that the officeholder might have to pay damages personally for his or her official actions. Such liability, the cases say, could prevent the officer from acting "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967),

quoting *Bradley v. Fisher*, 13 Wall. 335, at 349 note (1872). See also *Ferri v. Ackerman*, 444 U.S. 193, 204-205 (1979) ("[t]he point of immunity for [officials entirely shielded from personal liability] is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion").

For this reason both state and federal judges have exactly the same kind of immunity as the President of the United States: they can never be held personally liable to pay damages for any official action taken within the scope of their duties. *Dennis v. Sparks*, 449 U.S. 24 (1980). So do prosecutors, *Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976); grand jurors, *Imbler*, *supra*, 424 U.S. at 422-423; and other officers, both state and federal. See, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Butz v. Economou*, 438 U.S. at 513 (administrative hearing officers); *id.* at 515 (government lawyers wielding powers analogous to those of a prosecutor).

None of the other officers who possess this immunity from personal damage suits for ***official*** acts has any protection, however, temporary or permanent, from suits related to his or her private conduct while holding office. This is so because the considerations barring personal liability for official acts have no bearing on the individual's amenability to suit for private conduct.

The brief submitted on the President's behalf nonetheless contends that *Fitzgerald* barred personal liability for official acts in part because the mere obligation to defend lawsuits—any lawsuits—would be an improper drain on the President's time. Similarly, the President's academic amici say *Fitzgerald* rested on several pillars, one of which was the drain on presidential time caused by private litigation.

The Solicitor General, by contrast, explicitly acknowledges that this argument is wrong: his brief admits that *Fitzgerald* "did not implicate—and the Court accordingly did

not discuss—the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit." Brief for the United States as *Amicus Curiae* at 17.

The President's characterization of *Fitzgerald* is further undermined by the fact that no other immunity case is founded on the rationale Mr. Clinton advances—and neither, as the Solicitor General admits, is *Nixon v. Fitzgerald*: the case simply does not say that an immunity from damages actions should be created, even in part, because the mere fact of being sued would distract the President from his execution of his office. We submit that adoption of this argument would be tantamount to an assertion that, while performing his duties, the President is too busy to obey the law.

The *Fitzgerald* Court did indeed say that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Petitioner's Br. at 20; Brief for the United States at 15; Brief Amicus Curiae of Law Professors at 10, each quoting 457 U.S. at 751. But the "diversion" of which the Court spoke is the diversion of his attention a President would suffer if, ***in evaluating possible official actions***, he had to worry that one option or another might result in litigation in which he could be held personally liable. The *Fitzgerald* Court barred only those "private lawsuits" seeking to make the President pay out of his own pocket damages allegedly caused by his ***official conduct***. And the Court did so not because the President was too busy to attend to the cases in which such a claim might be made, so that he could not think about such cases and still have time to perform his duties, but because the prospect of the personal obligation to pay damages would distort his judgment ***as*** he did his job:

> As is the case with prosecutors and judges—for whom absolute immunity is now established,—a President must concern himself with matters likely to 'arouse the most intense feelings.' *Pierson v. Ray*, 386 U.S., at 554. Yet, as our decisions have recognized, it is in precisely ***such cases*** that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office. *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979). • • • Cognizance of ***this*** personal vulnerability could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

451 U.S. 751 (emphasis added). The arguments on behalf of President Clinton misapprehend this proposition, and attempt to transform it into the far different assertion—which this Court simply did not make—that private damages actions would force the President to think about such cases instead of thinking about his job. Neither *Fitzgerald* nor any other case of which we are aware so holds. Rather, the language in these cases about the burden of being a defendant reflects this Court's concern about the impact of litigation regarding official acts.[3] Any effort to make the cases say that the problem is litigation *per se* must begin by taking the relevant language out of context.

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[3] The one difference between the other immunity cases and *Nixon v. Fitzgerald* is that the possible harm from interference with the President's exercise of his discretion, caused by the imposition of personal liability for a faulty exercise of that discretion, is greater than it is from such interference in the exercise of discretion by other office holders. The concern about the unique scope of the President's duties, and of judicial interference therein, is shared by the other cases dealing with judicial review of discretionary ***official*** choices by the President himself, see *e.g.*, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1868), and manifests the courts' traditional reluctance to review the substance of the President's official decision making unless it is absolutely necessary. The short discussion in Part IV.B of this Court's *Fitzgerald* decision deals with this principle, and the result in that case is, in part, based on this consideration. See 457 U.S. at 754-755. But such reluctance has no place in this case, which does not relate to the President's official actions.

It also ignores the Court's admonition in *Fitzgerald* that "the sphere of protected action must be related closely to the immunity's justifying purpose." 457 U.S. at 755.[4]

Since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), through *United States v. Nixon*, 418 U.S. 683 (1974), and extending beyond *Nixon v. Fitzgerald*, the lower courts have come to agreement on the principle that the President is amenable to suit, even in his ***official*** capacity, when his presence as a defendant is absolutely necessary. There is now "no room for any difference [of opinion] as to the President's amenability to legal process." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 612 (D.C. Cir. 1974). If a plaintiff is entitled to relief and relief can only come from the President, the courts will require the President to afford relief. See, *e.g.*, *id.*; *Romer v. Carlucci* and *Western Solidarity v. Reagan*, 847 F.2d 445 (8th Cir. 1988); *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973); *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972).[5]

The President's academic amici point out, correctly, that such judicial second-guessing of official presidential actions is to be avoided when possible; and indeed, both before and after *Fitzgerald*, the courts have used a variety of other tech-

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[4] The President's academic amici cite a concurrence by Justice Scalia, in *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992), in support of their broad reading of presidential immunity. But Justice Scalia argued only against the issuance of injunctive relief against the President ***related to the execution of his duties***, on the ground that "[i]t is incompatible with his constitutional position that he be compelled personally to defend ***his executive actions*** before a court.") *Id.* at 827 (emphasis added). The considerations animating this position are identical to those alluded to above, see n. 3 *supra*. As we explained there, those considerations are irrelevant in this case because no official action is at issue here.

[5] A thorough and useful analysis of the relevant precedents, of which there are many, is set forth in Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L.J. 739 (1992).

niques, including standing, ripeness, and the political question doctrine, to avoid reaching the merits of cases against the President.[6] Even the President's amici do not say courts can never assert jurisdiction over the President in a case about his official duties.[7] And to our knowledge no case holds that the mere fact that he is President makes the Chief Executive immune from a suit challenging his official acts. See also L. Tribe, **American Constitutional Law** 278 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

We urge this Court not to reach a conclusion, or to embrace reasoning, inconsistent with this law. "In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, Mr. Chief Justice Marshall commented (5 U.S. (1 Cranch) at 162-63) upon the importance of providing an individual with a remedy when he is injured by a violation of law and noted the availability of the King himself in Great Britain as a defendant in such a situation." *National Treasury Employees Union*, *supra*, 492 F.2d at 609.[8] A deci-

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[6] A relatively complete collection of these arguments appears in the various opinions in *Goldwater v. Carter*, 444 U.S. 996 (1979). None of those opinions suggests that President Carter was immune from the suit, which concerned his official action of terminating the United States's treaty with Taiwan. Insofar as immunity is a threshold doctrine, one would have expected to see it raised if the government thought it applied.

[7] On the contrary, Professor Tribe joined a group of other academics who signed the Memorandum *Amicus Curiae* of Law Professors submitted in support of the plaintiff in *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). The brief is reprinted at 27 Stanford J. Int'l L. 257 (1991). This submission argued that relief should be afforded directly against the President of the United States, relating to the execution of his warmaking responsibilities as Commander-in-Chief. Surely if the President is amenable to suit in his official capacity over such weighty issues, there is no constitutional bar to his being a defendant in this case, in which relief will not relate in any way to the execution of his official duties.

[8] A number of other precedents, both in and out of court, show that Presidents have been directed to provide testimony. These authori-

sion that the President is not amenable to judicial process would make achievement of this important goal impossible.[9]

III. SEPARATION OF POWERS PRINCIPLES REQUIRE THAT THE PRESIDENT BE SHIELDED ONLY FROM SPECIFIC DEMANDS ON HIS TIME THAT WOULD ACTUALLY INTERFERE WITH HIS DUTIES

Because we believe that *Fitzgerald* does not speak to the question before this Court, we submit that the appropriate resolution of the President's immunity claim should be guided by other separation of powers cases, dealing with the President's amenability to process and with the standards governing separation of powers disputes. Those standards, we submit, make clear that this case should be permitted to go forward now.

Although the burdens of the presidency are great, there is simply no longer room for the argument advanced in the collection of quotations offered by the Solicitor General from

ties are directly relevant to the pending immunity claim, because they speak to the question whether the President's duties prevent his compliance with the orders of a court. The conclusion in each of these instances was that his duties were no basis for excusing him from such compliance. See generally **I Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law: Substance and Procedure** (West Pub. 2d ed. 1992) § 7.3. At § 7.1, the same Treatise lists voluntary and involuntary presidential appearances going back 200 years. See *id.* at 571-583.

[9] Significantly for present purposes, the government's response to this development has been neither public protest nor explicit agreement, but silent acquiescence. In the clearest and most elaborate appellate holding of which we are aware that the President can be named as a defendant when necessary, the government obeyed a court of appeals decision requiring the President to afford relief, and did not petition for certiorari. *National Treasury Employees Union, supra*. This is consistent with the fact that, before this Court as in the court below, the Solicitor General has not joined in the constitutional argument advanced by the President's personal counsel. Inasmuch as one of the Solicitor General's most important functions is to defend the Constitutional powers and prerogatives of the presidency, his refusal to make this argument is quite telling.

scholars and the memoirs of presidents:[10] as Chief Justice Marshall observed when he upheld the subpoena to President Jefferson, the office's "demand is not unremitting." *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807).[11] This Court's cases dealing with the separation of powers, like lower federal court cases focused specifically on the President's amenability to judicial process, make clear that the appropriate inquiry in evaluating a claim of presidential immunity is whether the specific presidential conduct sought will actually interfere with the President's execution of the duties of his office. A generalized assertion like the one offered here, that whole categories of cases pose too great a burden because the President is too busy to attend to them, is not enough to justify the suspension of personal responsibility for which the President asks.

[10] See Brief of the United States as *Amicus Curiae* at 10-12.

[11] President Jefferson is one of the authorities commonly cited (see, e.g., Brief of Petitioner at 16; Amicus Brief of Law Professors at 13) for the proposition that Presidents are not amenable to judicial process. Jefferson insisted no subpoena should have issued in *Burr*, and he said his subsequent release of the documents there demanded was "voluntary." See generally 9 **The Writings of Thomas Jefferson** (Ford ed.) 63-64. Chief Justice Marshall, however, disagreed with Jefferson; held him amenable to process; and ordered him to produce the documents. Because "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803), Chief Justice Marshall has prevailed in this disagreement, which is why this Court followed his view, and not Jefferson's, in *United States v. Nixon*. See *id.*, 418 U.S. at, *e.g.*, 713.

A. Under General Separation Of Powers Principles, Immunity From Suit Regarding Private Conduct Can Be Justified Only If President Clinton Can Show That His Amenability To Suit Would Actually Interfere With The Fulfillment Of the Duties Of His Office

As Justice Powell explained in his concurrence in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 963 (1983), "the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." The first of these two inquiries is the relevant one here: President Clinton argues that subjecting him to suit while in office would interfere unduly with the performance of his official functions.

In *Nixon v. GSA*, the Court articulated this standard, and applied it to resolve whether a challenged action "interfere[s] impermissibly with [another branch's] performance of its constitutionally assigned function:"

> in determining whether [a challenged act] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 71-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443. See also *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (question is "the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions") (quoting *Nixon v. GSA*, 433 U.S. at 443).

In *Nixon v. GSA* the Court upheld a statute stripping former President Nixon of control over his presidential papers, because he could not show that the challenged provisions would disrupt the conduct of duty by the Executive Branch. Similarly, in *United States v. Nixon*, the Court required the President to provide subpoenaed documents, in large part because no specific claim had been made of a "need to protect military, diplomatic or sensitive national security secrets." Rather, the claimed privilege was said to "depend[ ] solely upon the broad, undifferentiated claim of public interest in the confidentiality of [presidential] conversations." 418 U.S. at 706. This generalized assertion of privilege, this Court held, had to yield to the prosecutor's demand for information in connection with a simple criminal trial.[12]

Because no specific burden on President Clinton is yet at issue in this case, these precedents require the Court to attach significantly less weight to the President's claim of immunity. To demonstrate the need for protection from suit while in office at this threshold stage of the case, the President must

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12 Ignoring all of the above law, the President's academic amici assert that the burden is on the plaintiff to justify the assertion of judicial power over the Mr. Clinton, and they quote a line from *United States v. Nixon* in which the Court explained that it had ordered Mr. Nixon to produce evidence because there had been a "demonstrated, specific need for evidence." Brief Amicus Curiae of Law Professors at 13. Amicis' use of this short quote ignores the central fact that this Court in that case had required such a showing only ***after*** it had satisfied itself, by reviewing a number of directly applicable precedents, that a presidential privilege existed (in the confidentiality of ***official*** papers). Once such a privilege is found to exist, a party seeking to overcome it must indeed explain why the privilege has to yield. Here, however, the issue is the antecedent question ***whether*** the immunity claimed exists in the first place. The law, as we discuss above, is that, to prove the existence of this or any other privilege, the party asserting it must show why it is necessary to enable him to carry out his official duties. The assertion to the contrary by the President's amici is thus incorrect.

offer more than a hypothetical assertion of interference with his ability to perform his constitutionally assigned functions. If this litigation proceeds and the President complains of undue burden, the district court has ample discretion to adjust the proceedings for good cause, to consider motions to limit discovery, and otherwise to protect the presidency.

B. Cases Dealing With The President's Amenability To Process Also Require The President To Make A Specific Showing Of Conflict With His Duties In Order To Escape Any Particular Court Order

When Chief Justice Marshall upheld the subpoena to President Jefferson, he noted that a court can protect the President from being harassed by vexatious and unnecessary subpoenas by its conduct after rather than before issuance. *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807). See also *United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990) (while "it is settled that a President, whether former or incumbent, may be subpoenaed to be a witness in judicial proceedings in an appropriate case," courts have attempted "to exercise this power in a way that would be least damaging to the Presidency or onerous to the particular individual occupying the Office, to the extent that this was possible and consistent with the rights of the litigant who was in need of such testimony"). This approach "balances the accountability of the President with the practical demands of his office; it gives the courts the discretion to evaluate a President's claim of hardship in the context of particular demands and to adjust his ordinary obligations to the legal system in light of those hardships." Ray, *supra*, 80 Ky L.J. at 812.

This approach fits with the way this Court has analyzed other, analogous separation of powers problems, see *Nixon v. GSA*, *supra*; *Mistretta v. United States*, *supra*, and we therefore submit that this is in fact the appropriate inquiry: to avoid a particular kind of judicial process President Clinton must point to a specific form of interference in the conduct of

his duties that would be caused if such process issued.[13] A mere general assertion that he will be forced to spend all of his time attending to private legal obligations is not sufficient.[14]

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[13] Once he identifies a specific action required of him, however, and a specific reason why he cannot perform it, the proof he need offer to justify adjustment of the burden need not be overwhelming. In *United States v. Nixon* the Court emphasized that it would show "the utmost deference" when national interests are asserted as a reason for the courts to lift a litigation burden from the President. 418 U.S. at 710. Similarly, a district court should alter the timing or scope of discovery sought from the President on the basis of his assertion of "a facially legitimate and bona fide reason" for such a change. See, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Consistently with this standard, the courts have quite properly been deferential to a President's assertion that a particular presidential action cannot be performed as, or when, requested. See *infra* Part IV.

[14] It is within Congress's power under the Necessary and Proper clause of Article I to authorize other protection for the President if the legislature were to deem it necessary, such as indemnifying the President from the costs of a civil suit if he prevails. (A similar protection is afforded by the Ethics in Government Act, 28 U.S.C. § 593(f).) The legislature exercised this very power when it enacted the Soldier's and Sailor's Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-91. That act—which does not protect the President or other civilians who govern the military, such as the Secretary of Defense—represents the sort of immunity for which the President asks.

Congress's decision not to insulate the President in this way should be respected. As Justice Jackson explained in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (emphasis added), the President's powers are at their lowest level when he claims prerogatives "incompatible with the expressed ***or implied*** will of Congress." We submit that the legislature's decision not to protect the President from civil suit, even temporarily during a period of national emergency, represents a judgment that should not be second-guessed by this Court.

Finally, we note that Congress is also the appropriate source of any protection necessary from the possibility that the action of a state court might threaten the office of the presidency or the fulfillment of presidential duties. The current removal provision, 28 U.S.C. § 1442, authorizes the removal of certain actions against federal officials. The doctrine of protective jurisdiction may well go further than this statute, as the

IV. A WIDE VARIETY OF TOOLS IS AVAILABLE TO THE COURT TO PREVENT THE USE OF LITIGATION AS A TOOL OF HARASSMENT

There is probably no federal court in which baseless cases have not been filed against public officials for improper motives, including even the plaintiffs' opposition to the defendants' substantive policies. See, *e.g.*, *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (damages action against, inter alia, President Reagan and British Prime Minister John Major for their order that certain targets in Libya be bombed). Many such cases can be dismissed for failure to state a claim. See *id.*; *Komasinski v. Internal Revenue Service*, 588 F. Supp. 974 (N.D. Ind. 1984) (dismissing suit for failure to state a claim and for bad faith in using a complaint to advance a political, rather than a legal claim).[15] In addition, if appropriate, sanctions may be imposed on the litigants and/or their counsel. See *Saltany*, 886 F.2d at 440; *Komasinski*, 588 F. Supp. at 979 (requiring individual plaintiff to pay attorney's fees to government defendants because action was brought "for philosophical reasons rather than because of a sincere belief that a right had been violated").[16]

Solicitor General acknowledges. See Brief of the United States at 29, n. 20. Even if neither of these tools were sufficient to protect any presidential interest actually endangered by a state court suit, Congress is clearly empowered to extend federal removal jurisdiction to include such cases.

[15] See also 28 U.S.C. § 1915(d) (authorizing dismissal of in forma pauperis cases when the court is satisfied that the action is frivolous or malicious).

[16] President Clinton argues that the mere act of opening the courthouse door to private actions will cause an avalanche of such cases, and that people who are substantively opposed to a particular President's platform will use the courts to attempt to embarrass the President politically and to frustrate his efforts to implement the platform on which he was elected. The President implies that this case is indeed such an effort.

We note, however, that there has been no such deluge until now. We perceive no basis for predicting one in the future. Moreover, we have no way of knowing what the plaintiff's reasons are for prosecuting this case. We believe strongly, however, that they are irrelevant to the question now before this Court. If it is meritorious, this case should go forward, and the plaintiff should prevail, on the same time schedule she would face if she were suing anyone else, subject to the adjustments that are demonstrably necessary to accommodate the President's duties—adjustments, we wish to emphasize, that courts can and should make. If the case is meritless, and instead a political vendetta of some kind, the courts have many established tools for dealing with it, which are used often and successfully against baseless cases brought for improper motives against public officials. Use of these tools is vastly better than the law the President asks this Court to make: that he is unaccountable for his private actions precisely when his power is at its zenith.

The standard rules governing the subjection of the President to legal process are also capable of dealing with cases alleging conduct witnessed only by the plaintiff and defendant, and which may therefore be more difficult to dispose of on a threshold motion. Indeed, Section 1983 claims are often brought for actions witnessed only by the plaintiff and defendant—an archetypical example is the charge of police brutality. The courts have responded to this problem not by barring such cases but by imposing heightened pleading requirements and by an increased willingness to dispose of such cases on summary judgment. See, *e.g.*, *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989); *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987).[17] There is no reason why analogous requirements could not be imposed here. Similarly, discovery from the President might only be permitted if a plaintiff can offer corroboration of some kind that his or her claims have a factual basis.

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[17] While a heightened pleading requirement was rejected in *Leatherman v. Tarran County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 , 166 (1993) for municipalities, this Court noted that "unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983." See, *e.g.*, *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (suggesting that a plaintiff against whom qualified immunity has been invoked can be required to file a reply, pursuant to Fed.R.Civ.P. 7, explaining why the immunity does not apply on the facts at issue).

In the same vein, it has long been the law that discovery from the President may only be had if no other source is available for the same material. See, *e.g.*, *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989); *United States v. Mitchell*, 385 F. Supp. 1190 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 933 (1977); *cf. United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (the party seeking documentary discovery from the President must clearly establish its materiality). Indeed, changes made to Federal Rules of Civil Procedure 26-37 by the 1983 and 1993 amendments empower—and indeed oblige—the district courts to prevent harassing discovery against any party, even one less exalted than Mr. Clinton.

Similarly, the President's personal attendance at a trial has, to our knowledge, never been required; now that videotape depositions are available there is little reason to expect that such attendance would ever be necessary in any but the most singular circumstances. See *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975).[18] Documents subpoenaed from the President are routinely scrutinized *in camera* for relevance, as required by *United States v. Nixon*, and nonresponsive material is not turned over to the discovering party. *United States v. Nixon*, 418 U.S. at 715-716; *United States v. Poindexter*, 732 F. Supp. 135 (D.D.C. 1990). In *Poindexter*, President Reagan was also given the unusual right to have his

[18] The President's personal counsel argue that, as a practical matter, the accusations in this case are so important that he will have to attend the trial, and devote substantial personal time to preparation, even though he will not be legally obliged to do so. As this argument acknowledges, however, this is a function of the importance of the allegations Ms. Jones has made: if the allegations had been made in some other forum, such as a book or magazine article, their rebuttal would presumably also require the President's attention. Clearly the President cannot be shielded from most such demands on his time. The fact that these allegations happen to take the form of litigation does not, we believe, make them any different.

counsel review the defendant's ex parte submissions to the court setting out his discovery plan and defense strategy. 732 F. Supp. 163, 164 (D.D.C. 1990).[19]

Similarly, in *Degan v. United States*, 116 S.Ct. 1777 (1996) this Court noted that "the District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Fed.Rule Civ. Proc. 26(c)." *Id.* at 1782. In language directly applicable to this case, in which immunity has been claimed at the very outset of the proceeding and on an entirely empty record, the Court observed that "the details of these [protective] steps are committed to the discretion of the district court; it would be premature to consider now the precise measures the court should adopt as the case proceeds." *Ibid.*

The president argues that even allowing a district court to use these discretionary tools will provoke a constitutional confrontation between the executive and judicial branches: his proposed solution is to avoid the confrontation by having the courts yield entirely for as long as he occupies the White House. The argument is wrong-headed for two reasons. First,

[19] The availability of these unique protections shows that analogy to the criminal context, which both the President and the Solicitor General offer as a tool for analysis, is inappropriate. Criminal prosecution of a sitting President is problematic because imprisonment would quite clearly prevent the President from doing his job. A flexible order that, at some time convenient to the President, he sit for his deposition, is simply not the same thing. This President and others have in fact been questioned in legal proceedings without any untoward consequences. And it is important to observe that no other Order normally issued in a civil trial would compel the personal attendance of any individual party (including, of course, the President) at any hearing or other event. There is thus little danger that the trial court would ever have any need to make an extended or burdensome demand on the President's time. And yet only such a demand could give rise to the kind of problem that the President and his amici say make this case an impermissible threat to the execution of his official duties.

no constitutional confrontation will arise between the two branches, so long as the trial court before which the action is pending is appropriately deferential of the President's duties—and if the trial court were to mistakenly fail to provide such deference, a mandamus petition would clearly be the appropriate recourse. Such procedure, we believe, is vastly superior than the blanket rule that those people injured by someone who later becomes President are stripped of the right even to gather the evidence they will need to prove their claim for as long as the person who injured them remains in office.

The President's argument is also misguided because it ignores this Court's consistent warning of the danger of allowing a single branch to determine unilaterally the scope of its own inherent powers. "The extent of [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen*, 116 S.Ct. at 1780. "A [branch's] inherent power is limited by the necessity giving rise to its exercise." If there is "no necessity to justify the" exercise of inherent power at issue, then it is not permissible. *Id.* at 1783.

V. THE TEMPORAL IMMUNITY PRESIDENT CLINTON SEEKS IS FUNDAMENTALLY INCONSISTENT WITH THE CONSTITUTION'S EFFORT TO ENSURE THAT ALL OF THE POWERS IT CONFERS ARE CHECKED AND BALANCED

Perhaps the most important theme of the Constitution's separation of powers is that every grant of power must be counterbalanced by an effective, contemporaneous, corresponding restraint: the doctrine pervades the architecture of the Constitution in order "to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). One profoundly important

restraint binding the President, who participates in the creation of federal law and superintends its execution, is that he is bound by that law equally while he wields those great powers as when he does not. The provisions invoked in the complaint in this case—42 U.S.C. § 1983, and the Equal Protection and Due Process clauses of the Fourteenth Amendment—are part of this law. For precisely this reason "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Davis v. Passman*, 442 U.S. 228, 246 (1979), quoting *United States v. Lee*, 106 U.S. 196, 220 (1882).

Obedience is enforced by the courts, often at the behest of the people the law was designed to protect, rather than by the government acting on their behalf. The President's obedience is no less necessary—and no less important to the Nation—because compelled in this way. As Senator Pinckney explained from the well of the Senate many years ago, commenting on his own and his colleagues' work at the Federal Convention with respect to the question of the immunity accorded federal officials:

> [The Federal Convention] never meant that the body who ought to be the purest, and the least in want of shelter from the operation of laws equally affecting all their fellow citizens, should be able to avoid them; they therefore not only intended, but did confine their privileges within the narrow limits mentioned in the Constitution.

3 M. Farrand, The Records of the Federal Convention of 1787 at 385 (1966).

CONCLUSION

Although the separation of powers doctrine exists as our "greatest security against tyranny," *Mistretta v. United States*,

488 U.S. at 381, many disputes about the doctrine are far removed from any real threat of the exercise of unconstrained power. See, *e.g.*, *Bowsher v. Synar, supra*; *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). The temporal immunity President Clinton claims here, however, would eliminate the only mechanism that now formally enforces his obedience to the law he is empowered to execute for the entire time he holds that great power in his hands. The important laws at issue in this case are among those he is charged with enforcing, and there is no reason why he should be able to shield himself now from accountability.

This Court's cases clearly place upon the President the burden to explain why the license he seeks is necessary. We believe he has not borne that burden. Rather than issuing one broad-brush ruling, liberating this President and every successor from the obligation to respond in court like everyone else, we submit that this Court should require the President to explain how any particular demand of him in this case would interfere with his ongoing obligations. Instead of categorically consigning this plaintiff to legal limbo for years, the trial court can then use its discretion to prevent any disruption of the presidency from this plaintiff's efforts to enforce her rights.

Respectfully submitted,

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No. 95-1853

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Since its founding in 1920, the ACLU has sought to ensure that people whose constitutional or statutory rights have been denied have an effective means of redress. The ACLU has participated directly or as *amicus curiae* in many of this Court's cases concerning immunity of public officials, including the President. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The ACLU takes no position on the truth or falsity of the allegations of the Complaint. *Amicus* does assert that a President, sued for civil damages for actions taken outside the scope of his official responsibilities, is not entitled to an automatic (or nearly automatic) stay of the entire case until he leaves the presidency.[2]

STATEMENT OF THE CASE

Respondent alleges that while President Clinton was Governor of Arkansas he made unwanted sexual advances toward her and that, when she rejected these advances, she

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] This case arises in the context of allegations of actions, most of which occurred prior to Mr. Clinton being elected President. However, the arguments made by the President would apply equally to actions taken by a sitting President if those actions were outside the official responsibilities of the presidency. Thus, the critical factor is not when the actions occurred, but whether they were within the President's official responsibilities.

suffered in her employment with the Arkansas state government. Respondent also asserts that her initial intention was not to sue. However, when an article appeared in the press, which she believed implied that she had had a consensual sexual relationship with the President while he was Governor, she "saw herself as held up falsely to public scorn," *Prime Time Live* (ABC television broadcast, June 16, 1994) (transcript attached to Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity), and, given the discrepancy between this account of the incident and the account she had given to her friends, believed her friends might believe she had been untruthful. In addition, she alleges that the President denied her account of the incident, further casting doubt on her truthfulness.

The President asserts numerous defenses to these allegations, not the least of which is to deny respondent's account of the facts. However, prior to raising those defenses (and with the court's permission), the President filed a motion to "dismiss on the basis of Presidential immunity." *Jones v. Clinton*, 869 F.Supp. 690, 692 (E.D.Ark. 1994).

The district court denied the motion. *Id.* at 698. After reviewing the historical record and relevant case law, the court found that the Constitution itself was "silent on all of this" and that there was no dispositive case law. The court then summarized its holding with the following observation:

> [T]his Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writing of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that

> even the sovereign is subject to God and the law.

Id.

After rejecting the broad assertion of immunity, the court next considered a "limited or temporary immunity from trial." *Id.* The court first acknowledged "the necessity to avoid litigation, which might also blossom through other unrelated civil actions and which could conceivably hamper the President in conducting the duties of this office . . . [and] could have harmful effects in connection not only with the President but also with the nation in general." *Id.* The court then discussed the specific facts of this case, finding that respondent's claims did not seem to be "of an urgent nature." *Id.* at 699. Relying on the "equity powers of the Court" and Fed.R.Civ.P. 40, the court ruled that it would "put the case on hold, as far as trial is concerned." 869 F. Supp. at 699. Finally, the court held that there was "no reason why the discovery and deposition process could not proceed as to all persons including the President himself." *Id.*

The President appealed and the court of appeals generally affirmed, one judge dissenting. *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996). Judge Bowman, on behalf of the majority, held that the burden was on the President to establish the necessity for delay, either in the form of a rule of law, or in the specific circumstances of the individual case. Finding no dispositive decision of this Court, the court of appeals proceeded to balance the interests involved. It did so "'guided by the Constitution, federal statutes, and history' and . . . informed by public policy." *Id.* at 1358, citing *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982). More specifically, the decision below closely followed the analytic structure used by this Court in *Fitzgerald*, another case involving presidential immunity. Based on this informed balancing of interests, the court then concluded that "the Constitution does not confer upon an incumbent President any

immunity from civil actions that arise from his unofficial acts." 72 F.3d at 1363.

This Court granted the President's petition for a writ of *certiorari* and the President, joined by the United States and an *amicus* group of distinguished law professors argues that the district court and the court of appeals were in error. Each proposes a rule of law that would make it completely or virtually impossible for any person to pursue a civil suit for damages for actions taken by a President outside the scope of his official duties while the President holds office.

SUMMARY OF ARGUMENT

Under *Nixon v. Fitzgerald*, 457 U.S. at 756, a President's entitlement to absolute immunity does not apply to actions taken beyond "'the outer perimeter' of his official responsibility." The question presented here is whether a claim for damages that would otherwise be permissible under *Fitzgerald* should automatically, and in every case, be "deferred" until the expiration of the President's term in office.[3]

We respectfully suggest that the answer to that question is no for two fundamental reasons. First, the notion of deferring any litigation activity involving the President for up to eight years in all damage cases is inconsistent with our nation's deeply held view that no person is above the law.

[3] Although the motion in the trial court was a motion to dismiss on the basis of "Presidential immunity," the President now uses the term "deferral" rather than "immunity" to describe the relief sought. Because the President seeks a *per se* rule of law to mandate deferral, and relies upon "immunity" cases such as *Nixon v. Fitzgerald*, this semantic shift is of no significance. The President's request is for a form of immunity, albeit temporal rather than absolute. This brief uses the terms "delay," "deferral," and "immunity" interchangeably to reflect the relief sought by the President.

Second, the argument in favor of an automatic stay in all cases, regardless of circumstances, undervalues the very real prejudice that such a delay may create to aggrieved litigants. Among other things, memories fade and evidence becomes stale. The odds of prevailing on even nonfrivolous claims thus inevitably decline.

In some cases, that price may be inescapable. In others, it surely is not. Trial judges can and should be trusted to balance these competing interests with due deference to the special burdens faced by the President in fulfilling his duties. In particular, a trial court may fully utilize its authority over the pace and procedures of litigation to minimize the demands on the President. An automatic deferral of all litigation would, on the other hand, strip trial judges of their traditional case management responsibilities and effectively expand a President's absolute immunity from damages well beyond the carefully defined limits set forth in *Fitzgerald*.

The law disfavors immunities. Accordingly, the burden is upon the party seeking an immunity to establish its need. Neither the President nor his *amici* acknowledge this well-established rule,[4] nor do they seek to satisfy it except in the most general way -- by emphasizing the importance of allowing the President to conduct the nation's business with-

[4] The President does not explicitly address the burdens in cases such as this. He argues that the entire case should be delayed until he leaves office. Brief for the Petitioner (Pet.Br.) at 10. The United States argues that the entire case should be stayed unless respondent can establish "truly extraordinary circumstances [under which] a stay would not be required." Brief for United States as *Amicus Curiae* in Support of Petitioner (United States Br.) at 22. The law professors argue that the entire case should be delayed unless respondent establishes an "unusual circumstance [of] compelling need." Brief *Amicus Curiae* of Law Professors in Support of Petitioner (Law Professors' Br.) at 16. All three briefs argue that, to the extent the rule is less than absolute, this case does not fit the grounds for any exception.

out undue distraction. We agree with the importance of that interest, as did both courts below. The duties of the President of the United States, particularly with respect to foreign policy, are uniquely demanding. Presidents are called upon, often at all hours, to respond to national crises. But, as both courts below also held, it simply does not follow that no litigation can ever take place against a sitting President.

One of the major fears seems to be a threatened avalanche of frivolous lawsuits motivated by partisan political considerations. In our view, that fear is overstated. Nothing in the historical record supports it. Trial judges already have an arsenal of weapons at their disposal to deal with frivolous lawsuits if they occur. Finally, if not deterred by the prospect of sanctions, such lawsuits will be routinely dismissed with little or no demands on the President's time.

The difficult issue arises in nonfrivolous cases where the stakes are undeniably higher, both for the President and the opposing litigant. Even in this context, however, the demands on a President's time necessarily vary at different stages of the litigation, and from case to case. The absolute rule proposed by the President in this case does not take account of these differences. Instead, it effectively obliterates the line between official and unofficial conduct that this Court carefully established in *Fitzgerald* as the basis for a President's absolute immunity.

The President is not like any other litigant. But, like any other litigant, the President should still be required to justify a requested delay in the proceedings by showing that, given the particular phase of the case (*e.g.*, motion to dismiss, deposition, interrogatory), the suit will significantly interfere with his ability to carry out the specific duties of his office then commanding his attention, and that his ability to carry out those duties cannot be preserved by a less drastic alternative than a potential eight-year stay. The decision below is consistent with that approach and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT THAT THE PRESIDENT HAS THE BURDEN OF ESTABLISHING THAT, AFTER THE RESPECTIVE INTERESTS ARE BALANCED, IMMUNITY IS WARRANTED

The lower courts found that neither the Constitution nor any decision of this Court provides an authoritative answer to the question presented by this case. Those courts also found that, in determining the scope of any claim for immunity, the court must balance the respective interests with the burden of establishing the need for immunity on the party seeking immunity. *Jones*, 869 F.Supp. at 697-98. Those conclusions are correct and should be affirmed.

In *United States v. Nixon*, 418 U.S. 683 (1974), this Court unanimously held that the President could be compelled to provide evidence in a pending federal criminal case under appropriate circumstances. The Court first held that it was the province of the courts to determine the scope of any privilege, including one asserted by the President. *Id.* at 703-05. In determining the scope of any privilege, the court must balance the competing interests. *Id.* at 711-12. Furthermore, a generalized interest asserted by the President (in that case, confidentiality) cannot outweigh the specific interest in providing relevant evidence in a criminal case. *Id.* at 712-13. The Court also acknowledged the special care that must be taken in light of the unique position of the presidency and was careful to limit its holding to criminal cases. *Id.* at 712-16.[5]

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[5] In a number of subsequent cases, these principles have been applied and Presidents have been required to give evidence and even testimony in criminal cases. *See* United States Br. at 25, n.15.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court rejected the argument that federal officials were absolutely immune from damages for actions taken within the scope of their official duties. The Court held that any person seeking an immunity has the burden of establishing "that public policy requires an exemption of that scope." *Id.* at 506. The Court acknowledged that some officials could meet that burden and would be allowed absolute immunity. 438 U.S. at 503-17.

In *Nixon v. Fitzgerald*, 457 U.S. 731, the Court held that the President was one of the officials entitled to absolute immunity in some instances. Specifically, the Court held that the President was absolutely immune from damages for actions taken "within the 'outer perimeter' of his official responsibility." *Id.* at 756.

Noting that "[t]he President occupies a unique position in the constitutional scheme," *id.* at 749, the Court in *Fitzgerald* concluded that absolute immunity was warranted for actions taken within the scope of the President's official responsibilities for two reasons.[6] First, "damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 & n.32. Second, a suit could "distract a President from his public duties to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753.

[6] In explaining its holding, the Court reviewed the Constitution, history and the common law. The Court held that it must weigh "concerns of public policy, especially as illuminated by our history and structure of our government." 457 U.S. at 747-48. With respect to the President, the Court found that common law provided little guidance and that "the inquiries into history and policy . . . tend to converge." *Id.* at 748. No fair conclusion concerning the outcome of this case can be drawn from the limited and fragmentary historical evidence.

As the President acknowledges, the first rationale does not apply here because the complaint is based on actions that allegedly took place before he assumed office. The concern about distraction is a real one. However, *Fitzgerald* certainly does not hold that an automatic stay is appropriate in all cases during a President's incumbency. In many cases, perhaps most, the issue will not even arise because absolute immunity will attach. Moreover, *United States v. Nixon* suggests that all of the concerns about distraction are insufficient if balanced against sufficiently weighty concerns. *See also* Section II.A.1.

In short, none of these authorities provides a definitive answer to the question raised by this case. In fact, only three clear rules emerge. First, in measuring the need for, and scope of, a claim of immunity, the burden of proof is on the party seeking immunity. *Butz*, 438 U.S. at 506.[7] Second, as all parties recognize, in determining whether to acknowledge a claim of immunity, the Court must balance the interests of the respective parties and the public interest. Third, the problems created by judicial acts that affect the President's schedule are insufficient, if balanced against other, sufficiently weighty concerns, to cause the courts to grant an absolute immunity from participation in court proceedings. Thus, the structure of analysis utilized by the lower courts was correct.

[7] To the extent the President and his *amici* argue to the contrary, they are simply wrong. *See* Law Professors' Br. at 16, United States Br. at 22.

II. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT THAT THE INTERESTS OF THE PRESIDENT, ALTHOUGH SUBSTANTIAL, WHEN BALANCED WITH THE INTERESTS OF RESPONDENT, DO NOT JUSTIFY AN AUTOMATIC DISMISSAL OR STAY OF THE ENTIRE CASE

A. The Interests Of The President

The President and his *amici* suggest two major policy interests to support a broad immunity in this case: to prevent the President from being distracted from the duties of his office and to preserve the separation between the executive and judicial branches. As noted, this Court has already held that neither of these considerations, either separately or in conjunction, prevents the courts from requiring the occupant of the presidency from providing evidence in court under appropriate circumstances. Balancing the relevant factors in this case, neither factor, either alone or in conjunction with the other, should require the courts to establish a rule granting an automatic delay of a civil suit for damages for actions taken outside the scope of presidential responsibilities.

1. Distraction

There can be no question that the President, as any defendant, may be called upon to expend time in his defense. It also cannot be seriously denied that there may be occasions when the time required will be substantial and when the time being spent will divert him from his attention to his duties as President. Finally, this diversion may occur at the discovery phase as well as at trial.

There is a strong national interest in ensuring that the President not be unduly distracted from his responsibilities as President. The President and his *amici* are correct when

they suggest that the presidency is a unique office with uniquely broad responsibility. Particularly in the area of foreign policy, the President often speaks for the nation in a way that no other public official can. Moreover, foreign policy problems, in particular, are apt to occur at all hours and Presidents are awakened in the middle of the night to attend to vital matters affecting the entire nation and even the world. Foreign policy crises can be of singular importance, involving matters of war and peace, life and death. Thus, the first concern raised by the President -- distracting him from his duties -- is an important one.

However, this concern can be overstated. First, the President emphasizes that the executive branch, unlike the legislative or judicial, is headed by a single official. This means, he argues, that he alone must be available to make decisions 24 hours a day. Of course, many "presidential" decisions are made by lower level officials and never even presented to the President. Moreover, the same singularity applies to state governors who, within their sphere of responsibilities, are the lone, final decisionmakers.

The President must be available 24 hours a day, but that does not mean that Presidents actually work 24 hours a day. Of course they do not. All Presidents do, in fact, sleep, vacation, and engage in nonpresidential social and political activity.[8] Depending on their personal management styles, Presidents have worked more or less demanding schedules. Thus, President Carter was famous for working long hours,

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[8] The President suggests that no standards exist or could be developed to guide the courts in distinguishing "political" from "official" activities. Pet.Br. at 32. That is, of course, incorrect. For example, the President himself makes that judgment every time he travels and decides whether to bill the national committee or the taxpayers for the trip.

President Reagan for working at a more relaxed pace.[9]

Moreover, like the concern for confidentiality in *United States v. Nixon*, the concern for the President's time is generalized, not specific. Although there will be occasions during litigation when the President is called upon to expend significant time on his defense, there will also be occasions and even entire cases when he is not required to spend any substantial time on defense.

Many suits against an incumbent President are likely to be frivolous.[10] Courts have ample tools at their disposal for quickly dispensing with frivolous litigation, and it is fair to presume that those tools will be quickly employed when the President is a defendant. *See* Fed.R.Civ.P. 12, 12(f), 56. Furthermore, courts have broad authority to impose sanctions on parties and lawyers who file lawsuits "for any improper purpose, such as to harass"; lawsuits that lack evidentiary support"; and lawsuits that are lacking in legal basis. Fed.R.Civ.P. 11. Courts also have the power to award attorneys' fees, cite parties for contempt, and impose sanctions under their inherent powers. *Id.* (committee comments); *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

The President suggests that these devices will be ineffective in preventing frivolous litigation against a President because those bringing the suit are often more interested in the publicity than in the result of the action. However, the attention paid to those bringing allegations against a President comes not from the court proceedings, but from the factual allegations themselves and the media attention surrounding them.[11] Even if the President is given the kind of immunity he seeks -- a stay of proceedings until the end of his presidency -- a complainant is free to do what has already been done in this case: make public charges and file a complaint. The complainant is free to outline the evidence he will put forth at trial. And he will have the added advantage that he can rightly say that the President has chosen to hide behind presidential immunity rather than honestly confront the charges.[12] The only practical method for dealing with frivolous allegations is swift action under the Federal Rules to dismiss such cases.

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[9] *See e.g.* Lou Cannon, PRESIDENT REAGAN: THE ROLE OF A LIFETIME (Simon and Schuster, 1991) at 125 ("Reagan wasn't kidding in the slightest when he told television interviewer Charlie Rose during the 1980 campaign, 'Show me an executive who works long, overtime hours and I'll show you a bad executive'"); Hedrick Smith, *et al.*, REAGAN THE MAN, THE PRESIDENT (MacMillan Publishing, 1980) at 152.

[10] "Nixon Ready to Testify," The National Law Journal, Sept. 29, 1980, at 27:

> According to presidential counsel Lloyd Cutler's office, Mr. Carter hasn't been named in any suits for personal damages except those in which the president is cited along with a number of other defendants and quickly dismissed from the case. Mr. Ford's lawyer, Dean Burch, of Pierson, Ball & Dowd, of Washington, D.C., said the former president has been slapped with a number of suits relating to his pardon of Mr. Nixon, but "[t]o be candid I just refer them to Justice and don't worry about them." None of the suits has survived summary judgment.

[11] The President was asked questions about respondent's claims in this suit during a meeting with a prominent world leader. Hentoff, "A Day in Court for Paula Jones," Washington Post, Nov. 12, 1994, at A25. This encounter would likely still have occurred even if there were a rule that suits of this kind be stayed until the end of a President's term of office.

[12] If this Court really wanted to guard against the danger of frivolous allegations distracting a President, it would have to prohibit citizens from making public allegations against the President, whether or not they actually file a complaint or proceed to trial. But such a rule would clearly violate the First Amendment.

It is in nonfrivolous cases that the plaintiff's interest in redress and the drain on the President's time are both likely to be maximized. The President's solution to that dilemma is to favor a rule in every case granting the President an automatic stay during the duration of his presidency. That solution entirely discounts the plaintiff's interest, however; and although it might be the right answer in some cases, it should not be the automatic answer in all cases.

The concern about the President's time applies equally in the case of injunctive relief sought against the President, whether that injunctive relief is based on actions taken outside or within the scope of his official responsibilities. Even with regard to actions taken within the President's responsibilities, where damages may not be obtained, this Court has implicitly held that injunctive actions may go forward. In the immunity cases, the Court repeatedly cites *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for the proposition that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President . . . ." *Nixon v. Fitzgerald*, 457 U.S. at 753-54; *United States v. Nixon*, 418 U.S. at 707. *But see Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992)(Scalia, J., concurring).

The continued viability of *Youngstown* cannot be explained by the notion that a civil case seeking injunctive relief will invariably require less of the President's time than a civil case seeking damages. There will be cases in which that is so and cases in which it is not. Thus, the danger of diversion of the President's attention from matters of state is insufficient, standing alone, to justify an automatic stay or dismissal of litigation.

Similarly, *United States v. Nixon* stands for the proposition that despite the distraction that will inevitably flow, the President can be compelled to provide evidence, including

testimony, in a criminal case. In this case, the President and his *amici* argue that the case against defendant Ferguson should also be dismissed or stayed because the demands on the President's time as a potential witness would be so great. In other words, they argue that in a civil case, the rule of law should be the opposite from that in *Nixon*. Were this distinction to have value, it could not be as a result of any suggestion that being a witness in a civil case will inevitably involve more of a demand on the President's time than being a witness in a criminal case.

Thus, both *Youngstown* and *Nixon* must stand for the proposition that distraction to the President, while relevant, is insufficient, standing alone, to justify any immunity or stay. Where the distraction to the President is the principal factor supporting immunity, the critical issues are how great the distraction is likely to be, whether that distraction can be mitigated through less drastic alternatives than a stay, and what impact a stay will have on plaintiff's competing interests. By definition, those judgments can only be made on a case-by-case basis. Indeed, those judgments should be made at each phase of each case. *See* Section III.

Finally, the President suggests that if this Court were to affirm, it would signal a change in law and would invite a torrent of litigation, some abusive, against sitting Presidents. All parties agree that there have so far been few such suits filed. Significantly, however, the fact that there have been some suits in the past suggests that, contrary to the President's assertion, the common understanding of history has been that such suits were possible. Moreover, the small number of prior cases suggests that the President's fears of an explosion of nonfrivolous litigation are misplaced. *Jones v. Clinton*, 72 F.3d at 1362.[13]

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[13] As previously noted, substantial sanctions already exist against the (continued...)

There is an additional reason suggested by the court of appeals for rejecting the President's speculative fear of an avalanche of litigation. A President only interacts with a limited number of people in his unofficial capacity. "Thus, the universe of potential plaintiffs who might seek to hold the President accountable for his alleged private wrongs via a civil lawsuit is considerably smaller than the universe of potential plaintiffs who might seek to hold the President accountable for his official conduct." *Id.*

2. Separation of Powers

The President and his *amici* also argue that presidential immunity is necessary to preserve the separation of powers. In particular, the President argues that if a President moved for a continuance on the ground that he had to attend to an urgent matter of national interest, and the Court denied the motion, "the Court would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them." Pet.Br. at 30.

We agree that the President should not be treated as an ordinary litigant. Substantial deference should be given to his assertion, in a particular context, that his official duties require additional time or rescheduling of a particular matter. The history discussed by the President, however, convincingly demonstrates that the courts have already been, and presumably will continue to be, sensitive to the President's unique status as a litigant. *Id.* at 18, n.17, at 28, n.25. *See also* United States Br. at 25, n.15.

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[13] (...continued)
filing of frivolous lawsuits and such lawsuits will rarely, in any event, command much of the President's time. *See* p.12-13, *supra*. The fear that sitting Presidents will frequently be subject to nonfrivolous litigation for their private behavior rests on a supposition about the behavior and character of our Presidents that this Court should not indulge, and that history does not support.

Despite this history, the President suggests that it is improper or at least unseemly for the courts to be involved in executive matters. Thus, both he and his *amici* challenge the suggestion of the court of appeals that the trial courts would utilize sound principles of case management to prevent abuse of the President's time. More fundamentally, the President argues, any judicial inquiry into the value of the President's time only highlights the separation of powers issue.

It is well-settled, however, that the judiciary has not only the power but the duty to review the actions of the other coordinate branches. This principle was established by the Court almost two centuries ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). More recently, in *United States v. Nixon*, 418 U.S. at 707, this Court applied this principle to President Nixon's attempt to use a claim of executive privilege to insulate his presidential papers and tapes from a subpoena. In rejecting President Nixon's claim, this Court relied on the Constitution's grant of power to the judiciary, as well as its own holding in *Marbury*, in concluding that such an expansive view of separation of powers principles would "gravely impair the role of the courts under Article III." 418 U.S. at 707.

In this case, the concern about interference with the other branches is less than in *Nixon* and *Marbury*. In those cases, this Court upheld its own authority to review actions of the executive and legislative branches taken in their official capacity. In this case, by contrast, the actions at issue arose before Mr. Clinton became President, and the dispute concerns scheduling of the President's time, not review of his official actions. The interference with executive functions and the separation of powers concerns are accordingly less.

B. The Interests Of Plaintiffs

Although the President and his *amici* do not appear to directly address the question, *see, e.g.*, United States Br. at 21-22, it is clear that, in an appropriate case, immunity would not shield the President from being subjected to injunctive relief, even for acts committed at the center of his responsibilities as President. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579. It seems even more clear that the President could be subjected to injunctive relief for acts committed either before his presidency or committed during his presidency but irrelevant to his responsibilities. Thus, for example, a President would not be permitted to rely on any immunity doctrine, were his or her spouse to seek dissolution of the marriage; and a court would have the authority to resolve issues of child custody and support, notwithstanding that they affected the occupant of the presidency. *See, e.g.*, Pet.Br. at 42.

Assuming, therefore, that immunity does not automatically prevent a court from issuing injunctions against the President, whether the underlying issues arise out of his duties or not, the President's argument in this case appears to be that any plaintiff's interest in a damages remedy is always significantly less than any plaintiff's interest in injunctive relief. *See id.* Although this proposition may often be true, it cannot be said that it is always true. Adoption of the President's absolute view of immunity would thus result in some less important cases, pled to seek injunctive relief, going forward, while other more important cases, pled to seek damages, are long delayed. It is difficult to imagine the justification for such a rule.

In addition, cases seeking damages are often not purely, and sometimes not even primarily, about money. The ACLU takes no position on the motives of respondent in this case. However, she asserts that her interest in this case

is not in obtaining damages, but in restoring the damage that has been done to her reputation. Delay in obtaining damages can be overcome by the devices suggested by the President, including an award for past action in present dollars or an award of interest; although to plaintiffs of limited means, that delay may cause irreparable harm. Damage to one's reputation cannot be overcome. If respondent is correct, both in her version of the events and in her assertion of damage to her reputation, that damage will continue for the years of the Clinton Presidency. In this respect, the harm respondent asserts is continuing harm, as is the harm asserted when a plaintiff seeks injunctive relief. Her interest in repairing the damage she believes has been done to her reputation is no less important than the interest of many plaintiffs seeking forms of injunctive relief. It thus merits no greater immunity.

Moreover, as Judge Beam suggested in his concurrence below, delay in obtaining relief is not the only important effect of delay. "Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." 72 F.3d at 1363. The suggestion by the United States that testimony can be preserved, United States Br. at 21, of course applies to only the foreseen calamities, probably a less common category. At least one of respondent's claims might be extinguished if she were to unexpectedly die. 72 F.3d at 1364.

Finally, and perhaps most importantly, the ACLU acknowledges that the nation has an interest in ensuring that the President attend to his awesome responsibilities. However, the nation also has an interest in equal justice under law. Up to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporally. *Imbler v. Pachman*, 424 U.S. 409 (1976), *Stump v. Sparkman*, 435 U.S. 349 (1978)(prosecutors and judges subject to

suit for acts outside their official responsibilities). The nation has an interest in ensuring that our system of justice, rightly a matter of national pride, is available to all of its people, regardless of whether the party is high-born or low, holds high office or does not. That interest -- that compelling interest -- is far more important than the facts of this case. That interest, combined with the other interests of plaintiffs seeking redress for harms, compels rejection of a rule that automatically immunizes the President from civil suits during the duration of his incumbency.

III. THE GRANTING OF IMMUNITY SHOULD BE DECIDED AT EACH PHASE OF A CASE AND NOT FOR THE CASE AS AN ENTIRETY

The district court concluded that it would delay the trial of this case but would not delay the discovery. The district court was correct in concluding that the question of a stay or delay of this case should be decided at each phase and not for the case as a whole. At the same time, the court of appeals also correctly held that no particular phase of a case should be given an automatic stay and that it was an abuse of discretion for the district court to prejudge the question of delay of trial before that issue is ripe.

The specific facts of this case illustrate the need to look at the circumstances of each case rather than applying an automatic rule. The President asserted in his motion in the district court that, if his immunity claim were denied, he would be likely to move to dismiss on the grounds of statute of limitations, laches, and failure to state a claim. Each of these bases for a motion to dismiss must be established on the face of the complaint, and each presents a pure issue of law. Fed.R.Civ.P. 12. It will require little or none of the President's time for his counsel to file and argue those motions. If any of those motions are meritorious, the case will

be dismissed and will have required little or no expenditure of time by the President. Accordingly, a generalized concern over the President's time provides no basis for dismissing or adjourning this case prior to resolution of motions to dismiss.

The President and his *amici* suggest the need for a broader stay by arguing, correctly, that discovery can be as time consuming, and therefore as distracting, as trial. Of course, as suggested above, cases have more phases than discovery and trial, but even looking solely at the discovery phase, it is certainly true that some forms of discovery, such as the President's deposition, would inevitably require a considerable expenditure of his time. However, other forms of discovery, such as production of documents, are likely to require substantially less attention by the President. The district court has considerable authority to order that discovery proceed in the manner least disruptive of the President's time. For example, as trial courts have in the past, the district court in this case could require that any questioning of the President be done by written interrogatories. Fed. R.Civ.P. 26(c), 31. The lower courts' decisions in this case permit the President to seek such relief at an appropriate stage. *Jones v. Clinton*, 72 F.3d at 1362-63.

Both lower courts agreed that no automatic stay should be granted at any phase of this case. However, the court of appeals reversed the decision of the district court to delay trial, finding that the trial court had, in effect, granted an automatic stay of that phase of the case and had therefore abused its discretion. *Id.* at 1361. That decision was correct. The decision concerning trial is premature. If the President's alternative bases for moving to dismiss are meritorious, trial will never occur. If this case does reach a trial stage, a decision concerning timing can be made at that time.

In short, the President's request for an absolute rule of temporal immunity ultimately rests on three flawed propositions: that suits seeking injunctive relief will always require less expenditure of time than suits seeking damages, that plaintiffs seeking damages always have a less compelling need for immediate relief than plaintiffs seeking injunctive relief, and that all phases of all cases are equally distracting for a President. The lower courts properly rejected these propositions and properly held that questions of temporal immunity from civil damages should be decided at each phase of each case.

CONCLUSION

For the reasons stated above, the judgment below denying the President's request for an automatic stay of all phases of this case for the duration of his presidency should be affirmed.

Respectfully submitted,

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No. 95-1853

IN THE

Supreme Court of the United States

October Term, 1996

WILLIAM JEFFERSON CLINTON

Petitioner,

v.

PAULA CORBIN JONES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COALITION OF AMERICAN VETERANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE COALITION OF AMERICAN VETERANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Coalition of American Veterans, ("Amicus") respectfully submits this brief as amicus curiae in support of the the Respondent. Pursuant to Supreme Court Rule 37(a), the parties have consented to the filing of this

brief and the written consent has been filed with the Clerk of this Honorable Court.

INTEREST OF AMICUS CURIAE

The Coalition of American Veterans (CAV) is a corporation which represents over 100,000 United States Armed Forces veterans, both active-duty and retired, nationwide. The CAV is opposed to extending special privileges afforded by an Act of Congress to a specified class of people, such as the Soldiers' and Sailors' Civil Relief Act, to individuals not included in that class.

SUMMARY OF ARGUMENT

There is no legal basis for the relief the Petitioner seeks. First, the Petitioner no longer claims that he is entitled to a stay of litigation under the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Act") because he is on active duty military status, but now seeks that same relief by analogy. Such relief remains an extraordinary remedy, despite Petitioner's protestation to the contrary. The argument by analogy instead of by specific intent still seeks an unwarranted extension of a protection afforded by Congress, and which Congress only can extend, to someone Congress did not intend to protect. The power to analogize laws is the power to create laws. Second, no court has ever held that the President is entitled to official immunity for unofficial acts. To grant the relief Petitioner seeks would be

to violate the Respondent's civil rights and place the Petitioner above the law.

ARGUMENT

I. THE RELIEF SOUGHT REMAINS AN EXTRA-ORDINARY REMEDY AND AN UNWARRANTED EXTENSION OF A PROTECTION AFFORDED BY CONGRESS TO SOMEONE IT DID NOT INTEND TO PROTECT

In his brief, the Petitioner no longer claims that he is on active duty military status and, hence, entitled to relief under the Soldiers' and Sailors' Civil Relief Act of 1940. Instead, the Petitioner now contends that the relief he seeks is "analogous" to relief granted under the Act[1]. Yet, despite the fact that he no longer has a statute upon which he seeks to rely, the Petitioner asserts, "But these examples dispel any suggestion that the President ... is somehow seeking extra-ordinary relief ... ." (Pet. Brief, p. 37). Such is not the case. Thus, the Petitioner takes the position that he is entitled, by analogy, to the relief before the court which he now admits

[1] In his Brief, the Petitioner states that the Soldiers' and Sailors' Civil Relief Act "provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act." At footnote 32, he states, "President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation ..."

that Congress did not grant him. The logic underlying the Petitioner's analogy is flawed. Further, the analogy itself does not bear scrutiny.

While Petitioner would have the courts create a rule of law by analogy, ostensibly because of the importance of his office to the country, he fails to acknowledge that to do so would be the creation of law by a manner which the Constitution does not allow. In our constitutional republic laws are enacted by the Congress, not by analogy. Continuing the tradition of the common law, rules are enunciated by judges to interpret and advance the law, but laws, including interpretative rules pronounced by the judiciary necessary to the proper application of those laws, are not created by analogy. Intendment, either in a proscription of the legislative branch or as necessary to the carrying out of such intendment, must be found. There is no such intendment here and none is even argued. It is conceded, in fact, that with regard to the Act in question, it does not apply, yet still a result is sought as if it did apply.

Petitioner seeks to advance his analogy argument by listing five laws and judicial rules, including the Act. Four of these constitute a "smoke screen" intended to disguise the weakness of his analogy argument now that he has admitted the inapplicability of the Act. It is clear that analogizing from the Act alone does not have convincing force because it is to argue that Congress gave leave to expand the Act beyond what was intended by its clear language. The argument does not gain strength by bringing in four more

Petitioner's Brief, p. 36.

examples that are a disparate congeries and which certainly were not embraced in any way in the Congressional intent expressed in the Act.

Each of the other four examples cited by the Petitioner (the Bankruptcy Code, the practice of taking criminal matters first while civil matters involving the same parties are pending, the doctrine of exhaustion of administrative remedies, and the doctrine by which claims of qualified immunity are allowed to be appealed on an interlocutory basis) are either direct proscriptions of Congress, as is the case with the Act at issue and the Bankruptcy Code, are the result of necessarily carrying out such a proscription (as when Congress proscribes an administrative agency and procedure which must be followed before relief can be sought in the courts) or they are necessary to determine the extent of such a proscription as with the threshold determination of whether a qualified immunity obtains for an act committed in an official capacity, or finally, as with the priority to given to criminal over civil matters, they have been deemed necessary for the orderly administration of courts since the early days of common law. None of these things approximate the President's present situation.

What Petitioner seeks is not an extension of what Congress intended by analogizing from what Congress stated in a law or even in a set of similar laws, nor is it an extension by analogizing of what the courts have stated. It is an extension of what neither the Congress nor the courts

have stated. It is a principle enunciated out of, and impelled by, a claim of administrative inconvenience and which only then has been analogized to a list of disparate enactments and rules which have no common thread nor authorship but which have been searched out in an effort to justify the otherwise unsupportable argument.

What Petitioner is doing is asking this Court to create, rather than interpret, the law. He seeks to create by "analogy" that which he could have sought from the legislature. The Petitioner is the President of the United States of America. If he felt that he, as President, should have been entitled to a stay under the Act or other relief by special legislative act, he could have asked the Congress to pass such a law. This lawsuit was filed on May 6, 1994. Congress has been in session several times since then. The President has had ample opportunity to ask Congress to act, but, for whatever reason, has failed to do so. To suggest that courts create such a law by "analogy" is to usurp the authority of Congress. The power to analogize law is the power to create law.

What the Petitioner really seeks here is an unwarranted extension of a protection afforded by Congress in the Act to someone Congress did not intend to protect. In the face of public outcry and for the sake of political expedience[2], the President dropped his original claim that he was on active duty status and, therefore, exempt. Yet

[2] See "An Open Letter to the President of the United States from Medal of Honor Recipients," Chicago Tribune, May 27, 1996, and the news

now he seeks by "analogy" that same relief. Petitioner may be arguing by analogy, but the end result he seeks is the same: an unwarranted extension of a protection afforded by Congress to someone it did not intend to protect.

The use of analogy is not appropriate where Congress has expressed its intent specifically and, as the Petitioner has now conceded, the fact pattern at issue is not embraced within that intent. On the topic of analogy it is well stated, and it applies here, that "In working out the legal rights and liabilities arising from novel legal relationships, courts wisely strive to assimilate such to other long established and defined relationships to which the one in question is most similar. But analogy does not mean identity. It implies difference. Also the attendant use of established terminology only adds to the danger of carrying an analogy too far." (emphasis added). *Sturm v Ulrich* (8th Circuit 1925) 10 F2d 9, 11. Congress, in enacting a law such as the Act, considers what could be covered and defines what is covered in the final version of the bill. That which is different from that which is covered, even though it may be analogous in certain respects, is, by the intent of Congress, not covered. To argue, as petitioner does, that though he is not covered by the law, and not entitled to come within its scope, he is, nonetheless, entitled to its benefits by analogy, is not only to misconstrue the constitutional scheme for originating laws, it is to ask that that scheme be bypassed, and that laws originate with the executive branch, provided

paper article, "Honored Vets Flay Clinton in Ad," Washington Times, May 26, 1996.

that it can persuade the judicial branch that it would be inconvenient not to analogize them into being.

That Congress did not intend to protect someone in the Petitioner's position with the Act is readily apparent in the case of *Boone v. Lightner*, 319 U.S. 561 (1943). In that case, Boone, a Captain, sought a stay of proceedings against him in a North Carolina civil action on the grounds that he was in the military, stationed in Washington, D.C. In holding that the petitioner was not entitled to a stay simply because he was in the military, the Court undertook an exhaustive review of the legislative history of the Act. In footnote 2, Congress discusses who is to be protected:

> "Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that 'a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs. There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves, and the court would say to them, "no; your affair is a going concern; go ahead with the lawsuit. You have a lawyer ... .'"
>
> "The House Report on this bill, No. 181, 65th Cong., 1st Sess., stated: 'Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the

> defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against solders will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. Though not in military service, he may have property from which the income continues to come in irrespective of his presence; perhaps he may be some ne'er-do-well who only seeks to hide under the brown of his khaki ...' (p.2.)."
> *Id.* at 566-567.

In the present case it is clear that, even if he were in the active duty military, the Petitioner is not someone Congress intended to protect. If, as the Petitioner suggests, this Court were to grant a stay "analogous" to relief under the Soldiers' and Sailors' Civil Relief Act, a number of perplexing issues arise. Would this Court feel bound to impose "analogous" restrictions found in the Act? Despite the fact that the District Court also stayed the proceedings against co-defendant Ferguson, under Section 524 of the Act, the Respondent may be able to proceed against Ferguson. *Trujillo v. Wilson*, 189 P2d 147 (Colorado, 1948). Under section 521 of the Act, the trial court would have to make a determination as to whether the Petitioner's ability to conduct his defense was materially affected by his military service. *Jamaica Savings Bank v. Bryan*, 25 NYS 2d 17 (New York, 1941). Further, could it be that, under

section 573 of the Act, the President would defer paying his income taxes? Such a thing should not be. Clearly, the relief the Petitioner seeks here is an extraordinary remedy and one not intended by Congress.

Finally, the issue of whether the President, as Commander-in-Chief of the military is entitled to a stay of civil litigation against him under the Soldiers' and Sailors' Civil Relief Act has already been raised in court. In 1962, President Kennedy sought a stay from the California Superior Court in two lawsuits which were filed against him prior to his taking office. In footnote 10, Judge Bowman points out, "the Court denied Mr. Kennedy's motion for a stay, apparently without a written opinion, and the case eventually settled." *Bailey v. Kennedy*, No. 757, 200 (Cal. Super. Ct.. 1962); *Hills v. Kennedy*, No 757, 201 (Cal. Super. Ct. 1962)." (CCA p. 15, reported at 72 F.3d 1354). Just as the California Court found the President's argument to be without merit, we would urge this Court to do the same.

II. GRANTING THE RELIEF SOUGHT WOULD PLACE THE PETITIONER "ABOVE THE LAW."

No one is above the law. It is a basic principle of our system of justice that every citizen be afforded access to the courts. "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Courts, however, have recognized in certain situations that public officials, because of the nature of their duties, have immunity for their official acts. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Petitioner, however, asserts that he should be entitled to immunity for his unofficial acts. There is absolutely no legal precedent for the Petitioner's position, and to grant the relief the Petitioner seeks would violate the Respondent's civil rights and place the Petitioner above the law.

There can be no doubt that the President is subject to the legal process. We start with the proposition that "our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal laws ..." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Furthermore, the President can be sued in a civil lawsuit. *United States v. Nixon*, 418 U.S. 683 (1974), (where the Court ordered the President to release official presidential communications despite the claim of executive privilege), *National Treasury Employees Union v. Nixon*, 492 F2d 587, 615 (D.C. Circuit 1974) (where the court held that the President was subject to judicial process in a civil case). The question, then, is whether there is any law to keep the Petitioner, in his unique position, from being sued.

There is absolutely no legal precedent for the Petitioner's contention that he is entitled to official immunity for unofficial acts. As the American Civil Liberties Union pointed out to the 8th Circuit Court of

Appeals in its Amicus Curiae brief in support of Appellee Jones, "(u)p to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official governmental responsibilities, even temporarily." *Jones v. Clinton*, Nos. 95-1050, 95-1167 (Amicus Brief, p. 17). According to Judge Bowman, both sides agree that the case of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) is controlling. (CCA Opinion at p. 8. reported in 72 F.3d 1354). In Fitzgerald, this Court held that the farthest immunity extends is "to acts within the 'outer perimeter' of {the President's} official responsibility." Id. at 756. Further, as Chief Justice Burger points out in his concurrence, the President's immunity "does not extend beyond such actions." and "a President {is} not immune for acts outside official duties." Id. at 761 n.4, 759. Again, the Petitioner asks this Court to place him above the law. His request should be denied.

The delay the Petitioner seeks would also jeopardize the Respondent's case and place him above the law. The Petitioner downplays the potential effect of a delay, but justice delayed is justice denied. Witnesses die. Evidence is lost. Memories fade. In his concurrence, Judge Beam recognizes this fact:

> "Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal." CCA opinion, p. 19, reported at 72 F.3d 1354

Again, Petitioner has cited no legal precedent for placing himself above the legal rights of the Respondent and, hence, above the law.

The Petitioner's assertions also raise another perplexing issue. Let's assume for a moment that the Petitioner had been charged with a crime arising from the alleged encounter. If Petitioner had been charged with indecent exposure or solicitation as a result of the incident complained of, this Court would have no legal precedent for staying any criminal action or impeachment proceedings. Yet according to the logic the Petitioner proposes, if such criminal charges were filed, the state would be able to go forward on behalf of the victim but the victim herself would have no such right in a civil court. In fact, should this civil action be allowed to go forward, depending upon the evidence adduced at trial, it is not beyond the realm of possibility that criminal charges - and even resulting impeachment proceedings - could be instituted against President Clinton.

CONCLUSION

There is no legal basis for this Court to grant the relief Petitioner seeks. What the Petitioner seeks by "analogy" is an unwarranted extension of a protection afforded by Congress under the Soldiers' and Sailors' Civil Relief Act to someone Congress did not intend to protect.

The power to analogize laws is the power to create laws. Moreover, because the power to analogize laws would then be the power to enact laws that would be different than the laws intended by the legislative branch, the person analogizing the law would then be invested with the authority to make laws which the legislature had not intended, and possibly had rejected or did not want. He would then be above the legislature, and, therefore, above the law. This would be antithetical to everything which our Constitution stands for. No argument of expediency justifies such a result. To grant such relief would violate the Respondent's civil rights and place the Petitioner above the law.

This 9th day of September, 1996.

Respectfully submitted,

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(14)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

RECEIVED
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF THE UNITED STATES AS AMICUS CURIAE
FOR DIVIDED ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting petitioner. We further request that the United States be allowed 15 minutes of argument time. Petitioner wishes to cede 15 minutes of argument time to the United States and therefore joins in this motion. Granting this motion accordingly would not require the Court to enlarge the overall time for argument.

This is a private civil action for damages against the President of the United States based on conduct that is alleged to have occurred before the President took office. A divided panel of the Eighth Circuit rejected the contention, advanced by the President and by the United States as amicus curiae, that private civil actions for damages against a sitting President should be deferred until the conclusion of the President's service in office.

3 pp

The court of appeals held that both discovery and trial could proceed during the President's term.

In the view of the United States, to require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties. A sitting President cannot defend himself against private litigation seeking to impose personal financial liability, and bear the substantial burdens that such an undertaking entails, without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to do so would place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions, and would therefore violate the separation of powers under the Constitution. The United States has accordingly filed a brief amicus curiae arguing that this litigation should be stayed during the pendency of the President's service in office.

The United States has a substantial institutional interest in protecting the office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be compelled to take part in judicial proceedings in state or federal court. As we note in our brief in this case (see U.S. Br. 2 n.1), the United States has participated in several other cases that have presented

related issues of Presidential participation in judicial proceedings. We therefore believe that oral presentation of the views of the United States would be of material assistance to the Court.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996